United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF & APPENDIX

76-2024

To be argued by
MARC A. ROSENBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2024

UNITED STATES OF AMERICA,
Appellee,

—against—

CARMINE J. PERSICO, Jr., ET AL.,
Defendants,

CARMINE J. PERSICO, Jr.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR CARMINE J. PERSICO, Jr.



ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Appellant
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

MARC A. ROSENBERG
JOSEPH B. EHRLICH
Of Counsel

B
P/s

OF PAROLE in its consideration of petitioner's application

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the conditions or requirements which petitioner must fulfill

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ISSUES PRESENTED FOR REVIEW

1. Is the United States Board of Parole obligated and compelled to give institutional performance and conduct due effect as the mainstay standard for release in determining a prisoner's parole release application, when the prisoner was sentenced to a period of incarceration pursuant to 18 U.S.C. § 4208(a)(2)?

2. May the United States Board of Parole find a prisoner who has been sentenced to a period of incarceration pursuant to 18 U.S.C. § 4208(a)(2) not suitable for parole release, and hold him beyond the Parole Board's own established guidelines for parole release - which apply to all prisoners, a) on the predominant basis of the nature and severity of the offense for which the prisoner stood convicted, b) while completely disregarding a prisoner's institutional performance and response and c) when the reasons for continuing confinement beyond the maximum Parole Board guideline period lack reasonable factual basis?

3. Did the United States Board of Parole fail to give appellant, who was sentenced pursuant to 18 U.S.C. § 4208(a)(2), serious and meaningful parole consideration,

contrary to the Congressional intent and mandate of 18 U.S.C. § 4208(a)(2) as espoused by this Court in Grasso v. Norton, 520 F. 2d 7[illegible] (1975), and is the Parole Board's continuance of appellant's parole application to April, 1978, the eve of his mandatory release date, under a sentence otherwise affordable under 18 U.S.C. § 4202, unlawful?

4. Did the failure of the United States Board of Parole to afford appellant serious and meaningful parole consideration, coupled with the course of action and conduct attendant to appellant's parole release application, procedure and process, result in an abuse of the authority granted to the Parole Board by statute and amount to the denial of due process of law?

STATEMENT OF THE CASE

Preliminary Statement

Carmine J. Persico, Jr. appeals from a judgment entered against him on February 24, 1976, in the United States District Court for the Eastern District of New York, denying him relief sought pursuant to Title 28 United States Code Section 2255 in a petition filed with the District Court on December 4, 1975.

Argument with respect to the § 2255 application was heard before the Honorable John F. Dooling, United States District Judge, on February 6, 1976. Mr. Persico's argument was that the United States Board of Parole, in denying his application for parole release, totally disregarded the overriding importance of rehabilitation in the statutory scheme under Title 18 United States Code Section 4208(a)(2), and wrongfully, after recklessly disregarding his procedural due process rights, denied him parole and maintained him beyond established guidelines on the isolated factor of the severity and nature of the crime of which he stood convicted, in a manner which precluded his release to his otherwise mandatory release date. Appellant asserted that the Board of Parole failed to give appellant serious and meaningful

parole consideration, failed to afford appellant the underlying facts for the denial of parole, and by the Board of Parole's decision to continue his parole application to April, 1978, held appellant "nonparolable" in a manner contrary to the expectations of the sentencing court and contrary, under the facts and circumstances, to the statutory mandate of 18 U.S.C. § 4208(a)(2). The District Court, in an opinion dated February 20, 1976 (A.232)*, held that the Parole Board acted within its proper discretion in arriving at its decision to deny Mr. Persico parole and to maintain him beyond the established guidelines. The Court further held that an evidentiary hearing was not necessary, and that correction and reduction of his sentence were not warranted.

Pertinent Sentencing Facts

Mr. Persico is presently incarcerated in the United States Penitentiary, Marion, Illinois, pursuant to a sentence imposed by Judge Dooling on June 6, 1969, after appellant's conviction by jury of Title 18 United States Code Section 1951.

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* All references are to appellant's appendix, found herein immediately following the brief.

After the jury's finding of guilt of the appellant and co-defendants of indictment 60CR147, Judge Dooling, by memorandum, informed counsel that it was his disposition not to enter judgment of convictions against the defendants. The judge's memorandum, in pertinent part, set forth:

> "[T]he history of the present case through the day of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the government rights of retrial and orderly deliberations in seeking retrial....It is held that the aggregate here has reached a point at which to enter judgments of conviction against the defendants would be to deny them due process."

In United States v. Dooling, 406 F. 2d 192, 199 (1969), this Court ordered the trial judge to impose judgment of convictions and to sentence the defendants. The trial judge, consequently, on June 6, 1969, complied with the mandate of this Court; judgment of conviction was entered against Mr. Persico, and a fourteen year term of incarceration was imposed under Title 18 United States Code Section 4208(a)(2).

The imposition of such a harsh sentence, in direct contrast to the position originally taken by the sentencing judge in the aforesaid memorandum, was by all logic and reason prompted by the position taken against Mr. Persico

by the Department of Justice in conjunction with the decision of this Court directing that the trial judge sentence and enter judgment of convictions against the defendants. In any event, all factors bearing on Mr. Persico and the crime with which he stood convicted were before the sentencing judge at the time of imposition of sentence.

On July 3, 1972, in an in-chambers conference with reference to a request for reduction of sentence for Mr. Persico, Judge Dooling made it manifestly evident that the harsh sentence imposed on Mr. Persico would not have been rendered unless Mr. Persico was granted the benefit of consideration under Title 18 United States Code Section 4208(a)(2). Specifically, the transcript of the conference reflects the following pertinent statement made by Judge Dooling:

> "I am sure I would never give a sentence that long if it wasn't [an (a)(2) sentence]."

Consequently, Mr. Persico was afforded a sentence pursuant to Title 18 United States Code Section 4208(a)(2) and, as a matter of law, was to be afforded serious and meaningful parole consideration at an earlier date than the one-third point of his sentence. The Parole Board was mandated to give institutional performance and response to rehabilitative

programs due effect in determining whether parole should be granted. This was not the case, and Mr. Persico resultantly was denied rudimentary due process when the Parole Board failed to act consistent with the mandate of the sentencing court and the Congressional intent in the enactment of Title 18 United States Code Section 4208(a)(2), and when it otherwise obviated procedural due process rights to which Mr. Persico was entitled.

The Parole Process

In or about October, 1972, following an initial hearing in or about June, 1972, in which Mr. Persico was not advised of any adverse matters in his file later warranting "special offender" classification, and "original jurisdiction" designation, the United States Board of Parole summarily continued Mr. Persico's application for parole release to April, 1975, for an Institutional Review Hearing. It is noted that a thirty-six month set off is the maximum continuance provided for by Parole Board policy.

In view of Mr. Persico's scheduled parole hearing in April, 1975, Mr. Charles A. Craig, Mr. Persico's case manager, prepared a "Special Progress Report" (A.247). The report was nothing less than witness to Mr. Persico's

status as a model prisoner. In pertinent part the report set forth that:

> "[Mr. Persico's] work reports have always been of a satisfactory nature and he is considered to respond to supervision in a favorable manner ....He has maintained a clear conduct record since his arrival. Since his arrival Persico's overall adjustment has been deemed as good.
>
> * * *
>
> "Since his incarceration he has maintained a clear conduct record, has received favorable work and housing reports and has recently become active in self improvement."

Unfortunately, following a thorough delineation of Mr. Persico's excellent performance and response during the time of his incarceration, Mr. Craig concluded his report with the following invidious recommendation:

> "In view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted (emphasis added)."

Clearly, everything contained in Mr. Craig's report was inconsistent with the word "notoriety", and failed to set forth legitimate or proper basis for summary referral of the case for an en banc consideration by the United States Department of Justice, United States Board of Parole. In a bona fide effort to head off a course of conduct which would deprive Mr. Persico of judicially

recognized rights, his attorneys filed papers in the United States District Court for the District of Columbia, seeking relief pursuant to Title 28 United States Code Sections 2201 and 1361, to enjoin the Parole Board from referring petitioner's case for en banc consideration until (A.241):

"(a) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE specifically informs petitioner of all adverse matters in his file which will be taken into consideration by the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, including, but not limited to all reasons petitioner's case is being recommended and referred for en banc consideration; the reasons for the "notoriety of this particular case," and a statement whether petitioner's case is being referred for en banc consideration under 28 C.F.R. Section 2.17, and, if so, under which section thereof.

(b) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE affords petitioner full opportunity at the parole release hearing scheduled at the Federal Correctional Institution, Marion, Illinois, to respond and controvert the basis for en banc referral, in addition to all adverse matters in his file which will be employed by

the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE in its consideration of petitioner's application for parole.

(c) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE provides petitioner, for inspection and examination, all information which will be before the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, including, but not limited to petitioner's pre-sentence report; reasonably comprehensive and explantory guidance relative to the criteria considered in passing on applications for parole, and a statement whether factors which apparently merited recommendation and referral of petitioner's application for en banc consideration will be considered as a basis for denial of parole.

(d) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE afford petitioner at the parole release hearing scheduled at the Federal Correctional Institution at Marion, Illinois opportunity to respond thereto and to make a record allowing judicial review thereof.

(e) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE informs petitioner of all reasons for refusal of parole, should there be a denial of parole before

referral for en banc consideration, and, if so, setting forth the conditions or requirements which petitioner must fulfill for favorable consideration in addition to a probable, although not guaranteed, release date if such conditions are met, and should there be a departure from the guidelines of the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, an explanation for such departure in the denial of petitioner's parole.

(f) Grant such other and further relief as to this Court may seem just and proper."

The United States Board of Parole, United States Department of Justice moved the District of Columbia District Court pursuant to Title 28 United States Code Section 1404(a) for transfer of the case to the United States District Court for the Eastern District of Illinois, the judicial district in which Mr. Persico is incarcerated. The District Court in granting the application specifically stated (A.259):

> "The Court further concludes that the burden on the Government of bringing the plaintiff to this district for hearings, the availability of witnesses and files in the district of confinement, and the availability of speedier resolution in that district all militate in favor of transferring the case there."

months. While it is technically recognized that the Parole

Distressingly, while the United States Board of Parole acted in a manner totally oblivious to the merits of Mr. Persico's application for relief and continued in a manner in clear deprivation of Mr. Persico's rights, the District Court in Illinois literally "sat" on the case and did not in any means or manner respond to Mr. Persico's pleas for a determinatcn of his case.

On April 3, 1975, the scheduled parole hearing was held at the penitentiary in Marion, Illinois. The hearing was a sham, in that Mr. Persico, without any statement of reason, or prior notice, or hearing, and without disclosure of matters in his file purportedly warranting such classification or any opportunity to respond, was given "special offender" status by the Bureau of Prisons, and on April 14, 1975, without more, the Parole Board designated his parole application "original jurisidction" (A.260).

On April 28, 1975, the following decision was rendered by the National Appellate Board, which denied Mr. Persico's parole application, and continued him for a period of thirty-six months without further review (A.261):

"Continue for Institutional Review Hearing in April, 1978."

"REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 5. You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45 - 55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by this policy.

Your offense was part of a large-scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer risk than indicated by the salient factor score."

The decision did not comport with judicially required standards*, and gave insufficient weight, in fact

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* See memorandum of law submitted with papers originally filed with the United States District Court for the District of Columbia (A.249).

no value or consideration, to the Congressional emphasis on rehabilitation as a standard for release of (a)(2) prisoners. In fact, in denying Mr. Persico parole solely on the severity and nature of the offense, and setting off parole consideration to April, 1978, the Parole Board was expressly stating that nothing this man could do would gain him parole release (see Argument, infra), and its decision was inconsistent with the clear congressional policy expressed in the (a)(2) statute, and consequently the denial of parole was unlawful. Moreover, the Parole Board's reasons for continuing confinement beyond the maximum parole board guideline period (see, infra) lacked reasonable factual basis. Additionally, the United States Board of Parole failed to meaningfully offer or supply voluntarily one scintilla of the relief requested in Mr. Persico's papers, then sitting with the District Court for the Eastern District of Illinois.

On August 22, 1975, Mr. Persico's attorneys wrote to the Illinois district court and in pertinent part stated (A.264):

> "We understand that your Honor has been burdened with a heavy case load. However, since Mr. Persico's parole application has

> been decided by the National Appellate Board of the United States Board of Parole...we respectfully request that his petition for relief be expeditiously considered by the Court. In this regard, we note that Mr. Persico's petition was transferred to this Court by the United States District Court for the District of Columbia in consideration that there would be the availability of a speedier resolution in this district.
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> "In light of which we believe to have been a serious deprivation of Mr. Persico's rights and in view of the grievous loss suffered from its denial, we hope that this matter can be set down in the immediate future for argument or disposition."

No reply was received; however, on October 29, 1975, Mr. Persico obtained the result of his administrative appeal of the decision of the National Appellate Board dated April 28, 1978. By letter dated October 29, 1975, from Daniel J. Capodanno, Analyst, National Appellate Board, to Marc A. Rosenberg, Esq., it was confirmed that (A.266):

> "The United States Board of Parole, meeting in Dalls, Texas, on October 15, 1975, affirmed the previous decision dated April 28, 1975. However, Mr. Persico's salient factor score has been adjusted to 7. This means that his case has been continued for an institutional review hearing in April 1978."

As a result of the above, Mr. Persico moved the United States District Court for the Eastern District of New York for relief pursuant to Title 28 United States Code

Section 2255. It was evident that nothing Mr. Persico could do would obtain him parole release, not to say consideration under Title 18 United States Code Section 4208(a)(2). When his salient factor score was amended to 7, such substantial change did not merit, in the eyes of the United States Board of Parole, one scintilla of difference in its consideration of Mr. Persico's application for early release. Under Parole Board guidelines, Mr. Persico, under his new salient factor score, was incarcerated for a period greater than provided for by guidelines normally applied in ninety-two to ninety-four per cent of parole cases. Moreover, the guidelines apply to non-(a)(2) prisoners, as well as those who are mandated to receive special consideration when sentence is imposed pursuant to Title 18 United States Code Section 4208(a)(2). The greatest frustration, however, was realized when the basis of the Parole Board's denial of Mr. Persico's application was predicated upon the severity and nature of the offense. Nothing, then, Mr. Persico would or could do could change the manifest intention of the Parole Board to deny him parole release, notwithstanding his excellent institutional performance and prison conduct. Additionally, the Parole Board did not set forth adequate

grounds or the essential facts from which the Board's inferences purportedly were drawn. Finally, the Parole Board totally disregarded Mr. Persico's institutional performance and prison conduct, the mainstay elements in the statutory scheme under 18 U.S.C. § 4208(a)(2), and such disregard coupled with another maximum set-off of thirty-six months, to the very eve of Mr. Persico's mandatory release date, is both contrary to the purposes of Section 4208(a)(2) and unlawful. The totality of the circumstances evidence a course of action in serious deprivation of fundamental and rudimentary fairness and due process.

ARGUMENT

THE PAROLE BOARD IN DENYING APPELLANT'S PAROLE APPLICATION PRECLUDED HIS PAROLE RELEASE IN A MANNER WHICH IS IN CONTRAVENTION OF THE EXPECTATIONS OF THE SENTENCING JUDGE AND FOR REASONS WHICH ARE IN TOTAL AND RECKLESS DISREGARD OF THE INTENT OF CONGRESS AS EXPRESSED IN 18 U.S.C. § 4208(a)(2), AND CONSEQUENTLY, COUPLED WITH THE COURSE OF ACTION OTHERWISE ATTENDANT TO HIS PAROLE APPLICATION, APPELLANT WAS DENIED ESSENTIAL AND FUNDAMENTAL DUE PROCESS.

This Court poignantly stated in Grasso v. Norton, 520 F. 2d 27, 33 (1975):

> "The role of the judge in determing whether to sentence a defendant under Section 4208(a)(2) is a significant one.
>
> * * *
>
> "The decision of the sentencing judge to impose an (a)(2) sentence, beside relieving a defendant from the restriction placed on eligibility for parole by Section 4202, is an expression of the court's expectations (1) that serious and meaningful parole consideration will be given to the prisoner by the Parole Board at an earlier date than the one-third point of his sentence permitted by 18 U.S.C. § 4202; and (2) that institutional performance and response to rehabilitative programs will be given due effect by the Parole Board in determining whether parole should be granted."

Although Mr. Persico has been consistently considered to be nothing less than a model prisoner during the time of his incarceration, his good institutional performance

and prison conduct has been for naught, for his denial of parole has been based solely upon factors outside his reach to amend: the severity and nature of the offense.*

The Board of Parole, unequivocally based on adverse matters contained in his file, has classified Mr. Persico a "special offender" and designated his case to be one of "original jurisidction". Aside from the fact that such classification and designation has resulted in a grievous loss to Mr. Persico and that the Parole Board has undertaken a course of conduct where Mr. Persico cannot controvert, contest or otherwise respond to any adverse matters in his file, which may be incorrect or of an irremediably prejudicial nature,** the Board of Parole has seen

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* The guidelines proffered by the Parole Board manifestly utilizes a system which gives weight to a multitude of factors including the severity of the offense. See Kortness v. United States, 514 F. 2d 167, 169 (7th Cir., 1975).

** On or about February 6, 1976, the date argument was before Judge Dooling with reference to the § 2255 motion, the United States District Court for the Eastern District of Illinois scheduled February 19, 1976, as a date for argument with reference to the Government's motion to dismiss appellant's papers originally filed with the United States District Court for the District of Columbia. This date was nearly one year after the case was transferred to the United States District Court for the Eastern District of Illinois. On March 22, 1976, when Marc A. Rosenberg, Esq.

fit to completely and recklessly disregard "rehabilitation", and to wrongfully deny Mr. Persico parole on the isolated factor of the severity and nature of the offense.

In Stroud v. Weger, 380 F. Supp. 897, 901 (N.D. Pa., 1974) as cited in Grasso v. Norton, supra, the Court stated with respect to parole consideration to be afforded to the (a)(2) prisoner:

> "The new element absent from the (a)(2) prisoner's initial hearing that needs to be taken into account at the one-third point is his institutional performance and prison conduct...."

Without doubt, the severity and nature of the offense, and all other adverse matters before the Board of Parole, by the hands of the Department of Justice or otherwise, were all before the sentencing judge on June 6, 1969, the date of imposition of sentence. For the Board of Parole to now utilize such factors as the sole and isolated basis

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appeared in the Illinois district court, subsequent to the court's allowing Mr. Persico's attorneys opportunity to file a writ of habeas corpus, Timothy Gifford, Esq., an Assistant United States Attorney for that judicial district, informed Mr. Rosenberg that the Department of Justice would never permit the turning over to Mr. Persico of prejudicial and adverse material in his file. The Illinois action is presently pending.

for denial of parole, in conjunction with its total disregard of the prisoner's "rehabilitation", is improper, illegal, contrary to the legislative intent of Congress, in disregard of the mandate of the sentencing court, and as a matter of law an abuse of discretion and authority on the part of the Parole Board.

In Grasso v. Norton, supra, 520 F. 2d, at 33, this Court stated:

> "Judge Newman pointed out in Grasso I that '[s]entencing judges using the provisions of § 4208(a)(2) have done so in the expectation that the board will consider prison performance in deciding whether to grant early parole' 371 F. Supp. at 174."

Judge Dooling, prior to the date of imposition of sentence, deemed that the defendants convicted under Indictment 60CR147, after undergoing numerous trials and appeals had been, in fact and in essence, subjected to great distress and sufficient punishment in that the numerous trials and appeals in the case were in and by themselves oppressive. After this Court had ordered that the judge enter judgment of convictions, the sentencing court imposed a period of incarceration of fourteen years with respect to Mr. Persico, which sentence was diametrically opposite to its original intentions as recorded by its

memorandum. The Court, however, in imposing such a harsh sentence, in apparent contradiction to its original intentions, clearly set forth that the mandate of the sentencing court was that Mr. Persico's fourteen-year sentence be pursuant to Title 18 U.S.C. § 4208(a)(2). At a time subsequent to imposition of sentence, the sentencing court made it clear that it would not have imposed such a harsh and severe sentence had it not been pursuant to Title 18 U.S.C. § 4208(a)(2).

The Board of Parole's action in denying Mr. Persico parole on the isolated basis of the severity and nature of his offense is unlawful, in that such reasoning flies contrary to the mandate and expectation of the sentencing court at the time of imposition of sentence, and rests contrary to standard for release provided for by 18 U.S.C. § 4208(a)(2).

First, as a matter of pure logic and elementary reasoning, under such reasons for denial of parole, no man could ever gain parole, not to say (a)(2) consideration, because the severity of the offense, the "notoriety" of the crime and ipso facto of the man, would necessarily travel with him the entire time of his incarceration. Succinctly stated, nothing the man could do would gain him parole.

Under such reasons and factors, no convicted defendant ever could unravel himself from such a boxed in position. All such factors were before the sentencing judge whom has been delegated the power and responsibility to impose a sentence reflecting all such factors and other relevant criteria before it at the time of imposition of sentence. For the Board of Parole to deny parole and to continue Mr. Persico to April, 1978, the eve of his mandatory release date under a sentence otherwise affordable under § 4202 under Title 18 United States Code (A.208), in view of his institutional performance and conduct, is improper, illegal and an abuse of discretion as set forth herein.*

In Garafola v. Benson, 505 F. 2d 1212, 1217 (7th Cir. 1974), as cited in Grasso v. Norton, supra, 520 F. 2d, at 33, the Circuit Court stated:

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* Moreover, in accord with the opinion of this Court in United States v. Slutsky, 514 F. 2d 1222, 1229 (1975), to withhold parole on the severity and nature of the offense denies Mr. Persico mandated (a)(2) consideration since Mr. Persico will not receive the parole treatment envisioned by the sentencing judge, inasmuch as under such reasoning Mr. Persico will never receive parole release, not to say parole before the one-third point of his time of incarceration.

"A major purpose of any indeterminate sentence provision is to give the parole board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to live in the community. By keeping the minimum low, the prisoner is encouraged 'to earn favorable consideration for parole in accord with the public policy imposed in the parole statutes.' National Council on Crime and Delinquency, Guides for Sentencing 21 (1963)."

The granting of probation or parole does not extinguish a defendant's penal obligations. United States v. Ross, 464 F. 2d 376, 379 (2d Cir., 1972). Parole eligibility does not alter a prisoner's sentence. "It is a far different thing from reduction of sentence." See, O'Neal v. United States, 332 F. 2d 152, 154 (9th Cir. 1964). Parole is not a "forgiving", and "a parolee is not free of his sentence", but continues to be in custody under that sentence. See Ex Parte Rupert, 38 F. Supp. 152, 153 (N.D. Tex., 1941); United States ex rel. Gulterson v. Thompson, 47 F. Supp. 150, 151 (E.D. N.Y. 1942), aff'd. 135 F. 2d 626 (2d Cir., 1943); Pachilla v. Lynch, 398 F. 2d 481, 482 (9th Cir., 1968).

Mr. Persico's salient factor score was amended by the United States Board of Parole in October, 1975. The

substantial change in the score from 5 to 7* did not merit one iota of difference in the Parole Board's consideration of Mr. Persico's application for parole release.**

Consequently, on February 6, 1976, the date argument was heard by Judge Dooling, Mr. Persico had been incarcerated for a period of time greater than the Parole Board's guidelines, which in Mr. Persico's case provide for release within a time range of thirty-six to forty-five

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* Under the Parole Board's guidelines (A.267) which relate to all prisoners, (a)(2) as well as to non-(a)(2) prisoners, appellant was within a time release range of 36 - 45 months. Prior to the change in his salient factor score, the time range was 45 - 55 months. Mr. Persico has now been incarcerated more than 50 months.

** In Grasso v. Norton, supra, 520 F. 2d at 32, it was poignantly stated:

> "It is of particular note, however, that Congressman Emanuel Celler, then Chairman of the House Judiciary Committee and author of the bill, recognized that Section 4202 created a 'purely arbitrary limitation which does not take into consideration the varying responses which individual prisoners made to rehabilitation program carried on in our Federal penal and correctional institutions.' Congressman Celler pointed out that Section 4208 would permit the release under supervision (emphasis added) at an earlier date, should a prisoner's response to rehabilitation justify it."

months. While it is technically recognized that the Parole Board may maintain, in fact, a prisoner beyond the time provisions as set forth by the guidelines, it is strongly emphasized that the Parole Board cannot utilize its interpretation of the offense, a matter clearly within the power and responsibility of the sentencing court, to estop his parole release - but must rely on considerations of institutional performance and prison conduct and relevant criteria thereto to allege that parole release is inconsistent with the provisions of a sentence imposed pursuant to Title 18 United States Code Section 4208(a)(2). Cf. United States v. Fletcher, _____ F. Supp. _____ (D.D.C. 9/16/76); United States ex rel. Mayet v. Sigler, 403 F. Supp. 1243 (1975). For the Board of Parole to deny Mr. Persico parole release, and to hold him for a period of time greater than the guidelines, which guidelines it is emphasized apply also to § 4202 prisoners, makes mockery of the legislative intent in the enactment of § 4208(a)(2) and circumscribes the mandate and expectation of the sentencing court at the time of imposition of sentence.*

* Moreover, the Board has set forth reasons for continuing appellant's confinement beyond the maximum guideline period which lack any reasonable factual basis. To give reasons totally lacking in rational evidentiary support credence constitutes an abuse of discretion amounting to the denial

Because of the above, the actions of the Board of Parole as a matter of law and as a matter of rudimentary due process and essential fairness are not in accord with and within the limits of the authority granted to the Board by statute. To disregard the crucial and critical element of rehabilitation and to emphasize the severity and nature of the offense to distort the availability of parole release

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of due process of law. See Zannino v. Arnold (M.Pa., 9/12/75). Also see King v. United States, 492 F. 2d 1337 (7th Cir., 1974) as cited A.254; Billiteri v. United States Board of Parole, 400 F. Supp. 402, 403, 409 (W.D. N.Y. 1975).

This Court poignantly stated in Haymes v. Regan, 525 F. 2d 540, 543, 544 (1975):

> "This requirement [specific statement of reasons for denial of parole and the underlying facts with respect thereto], if properly observed, should serve to protect the inmate from arbitrary and capricious decisions or actions grounded upon impermissible considerations. United States ex rel Johnson, supra, 500 F. 2d at 929. See also Cardaropoli v. Norton, 523 F. 2d 990, 998, 999 (2d Cir., 1975). The compulsion upon the decision maker to set forth the reasons in each case of denial of parole, with some specificity, 'promotes thought by the decider' and compels him to 'cover the relevant points.' Frankel, Criminal Sentences 40-41 (1973).
>
> * * *
>
> "Moreover, it [the statement of reasons]must provide the inmate with both the grounds for decision to deny him parole, and the essential facts from which the Board's inferences have been drawn."

cannot be sanctioned or countenanced by a court of law.

As Judge Frankel noted in Sobell v. Reed, 327 F. Supp. 1297 (S.D.N.Y., 1971):

> "But it is urged that the board's action is outside the court's power of review. It would be surprisingly and gravely questionable if Congress had meant to confer such final authority upon any administrative agency, particularly one that makes no pretense to learning in constitutional law."

The Judge furthermore stated in his learned opinion:

> "To be sure, the Parole Board is vested with broad discretion to set the terms and conditions on which a parolee may be released. See 18 U.S.C. 4203 (1964), United States ex rel. Sperling v. Fitzpatrick, 426 F. 2d 1161, 1166 (2d Cir. 1970), (Kaufman, J. concurring). It is not the law, however, that such discretion embraces authority to decide final questions of constitutional [and statutory] right for Parole Board members and prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions.
>
> * * *
>
> "We do not denigrate their views, but we cannot be absolutely bound by them. Brown v. Peyton, 437 F. 2d 1228, 1232 (4th Cir. 1971) (emphasis added)."

Judge Feinberg, in his concurring and dissenting opinion in Grasso v. Norton, supra, stated:

> "Congress has not removed rehabilitation as the most important standard governing release at least under (a)(2). Therefore both this court and the Board (emphasis supplied) are bound to respect the intent of Congress expressed in Section 4208(a)(2).
>
> * * *
>
> "The plain fact is that at that point [one-third of prisoner's sentence], the (a)(2) prisoner's institutional adjustment was meant by Congress and the sentencing judge to be the most important consideration."

As a result, once the Parole Board's reasoning for denial of parole is stripped away, as it properly should be, it is manifest that Mr. Persico under the totality of the facts and circumstances has been deprived of rudimentary due process and essential fairness, and since there are no longer reasons for preclusion of parole, and because his institutional performance and conduct are consistent with parole release, and because the interests of justice compel, in light of all the above and in view of the failure to afford him procedural due process in his parole procedure during the course of over a one year period of time, we submit that this Court should remand Mr. Persico's case to the lower court for immediate reduction of sentence to reflect conditions affording appellant immediate parole

release.* In the interim, or in the alternative, we submit, that this Court has the power and authority pursuant to Title 28 United States Code § 1361 to order the Board of Parole to effectuate his immediate release under parole supervisory conditions in accord with the statutory scheme under which Mr. Persico was sentenced. For as we read Grasso v. Norton, supra, good institutional performance and prison conduct nearly make it mandatory, at the very least, for a prisoner sentenced pursuant to § 4208(a)(2) to be released on parole under the guidelines computed and prepared for release of all prisoners, including non-(a)(2) prisoners, which guidelines are applied in ninety-two to ninety-four per cent of the cases. The reasoning employed by the Board of Parole to manifestly maintain Mr. Persico beyond the guidelines, for the reasons aforesaid, is both improper and insufficient, and totally disregards the import of

* In Kortness v. United States, 514 F. 2d 167 (8th Cir., 1975), the Court found that conditions abusive of the sentencing court's mandate under 18 U.S.C. 4208(a)(2) were subject to relief by way of 28 U.S.C. § 2255. It is noted that the relief requested in the district court from which this appeal is taken, sought alternative relief in terms of the grant of such other and different relief the court may have deemed just and proper. We submit that the totality of the facts and circumstances warrant such relief as requested above to rectify a manifest abuse of due process and rudimentary fairness.

18 U.S.C. § 4208(a)(2), as expressed by the statute and elucidated by this Court's decision in Grasso v. Norton, supra, and failed to provide Mr. Persico the special consideration mandated by the Court and is otherwise clearly unlawful. The totality of the circumstances warrants immediate relief to Mr. Persico. It is an elementary principle of our mode of jurisprudence that an untarded abuse of an individual's due process rights, compels immediate and substantial relief.

CONCLUSION

THE JUDGMENT ENTERED IN THE LOWER COURT SHOULD BE REVERSED, AND THE ACTION REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO MODIFY, CORRECT AND REDUCE APPELLANT'S TERM OF INCARCERATION TO ONE WHICH WOULD AFFORD HIM AN IMMEDIATE MANDATORY RELEASE DATE; IN THE INTERIM, OR IN THE ALTERNATIVE, THE COURT SHOULD ORDER THE UNITED STATES BOARD OF PAROLE, PURSUANT TO 28 U.S.C. § 1361, TO RELEASE APPELLANT ON PAROLE UNDER PAROLE SUPERVISORY CONDITION WHICH THE PAROLE BOARD CAN DEVELOP AND IMPLEMENT WITH REFERENCE TO A PAROLE PLAN FOR APPELLANT.

Respectfully submitted,

ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Appellant

MARC A. ROSENBERG
JOSEPH B. EHRLICH
Of Counsel

APPENDIX

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PLAINTIFFS

UNITED STATES OF AMERICA

DEFENDANTS

CARMINE J. PERSICO, JR., et al

PURSUANT TO SEC. 2255

CAUSE

(Related Cases: 60-CR-147 - and 74-C-237)

ATTORNEYS

DAVID G. TRAGER
U. S. ATTORNEY
225 Cadman Plaza East
Brooklyn, N.Y. 11201

ROSENBERG, ROSENBERG & ROCKMAN, ESQS.
200 Garden City Plaza
Garden City, N.Y. 11530

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the above, that Judge DOOLING took into account, in passing

U.S.A. vs. CARMINE J. PERSICO, JR., et al

DATE	NR.	PROCEEDINGS
12 -4-75		NOTICE OF MOTION FILED AND AFFIDAVIT OF MARC A. ROSENBERG, ESQ., filed (attached) for correction and reduction of petitioner's sentence as imposed by this Court on June 6, 1969, etc. (returnable Dec. 15, 1975) (1)
12-4-75		Memorandum of Law filed on behalf of petitioner, etc. (2)
12-24-75		BY DOOLING, J. MEMORANDUM AND ORDER FILED. ON THE ARGUMENT of the motion a decision will be made on the need for an evidentiary hearing. The Government will be allowed until Jan. 20, 1976 to submit its opposing papers. IT IS SO ORDERED. (See Memo.,etc.) (3)
12-24-75		Affidavit of MARC A. ROSENBERG, ESQ., filed in support of petitioner's motion, etc. (4)
2-9-76		Supplemental memo of law to review action of US Parole Board filed. (5)
2-6-76		Before DOOLING,J.- Case called. Civil motion argued. Decision reserved.
2/10/76		Stenographers Transcript dated 2/6/76 filed (5a)
XXXXXX		
2-23-76		By DOOLING,J.-Order dtd 2-20-76 that application for relief under 28 USC 2255 is denied, and the application, treated as a motion to resentence or for reduction of sentence is denied filed. (6)
2-24-76		Judgment that the petitioner take nothing of the respondent and that the application is denied filed. (7)
2-25-76		Unsigned order dtd. 12-22-75 with reply motion of USA and affadavit in support of govt's notion in response filed. (8)
2-25-76		Notice of appeal filed. (9)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

- against - :

CARMINE J. PERSICO, JR., et al., :

Defendants. :

----------x

NOTICE OF MOTION

60 CR 147

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of CARMINE J. PERSICO, JR., sworn to the 26th day of November, 1975, and upon the affidavit of MARC A. ROSENBERG, ESQ., sworn to the 3rd day of December, 1975, and upon the Memorandum of Law submitted herewith and upon all the other papers and proceedings heretofore had herein, motions will be made before the Hon. JOHN F. DOOLING, United States District Judge, at the United States Court House located at 225 Cadman Plaza East, Brooklyn, New York on the 15th day of December, 1975, or as soon thereafter as counsel can be heard, for orders as follows:

(A) Under authority of 28 U.S.C. Section 2255 for relief by way of correction and reduction of petitioner's sentence as imposed by this Court on June 6, 1969, in accordance and conformity with the intention of the sentencing Court within 18 U.S.C. 4208 (a) (2);

(B) under 28 U.S.C. Section 2255 that a hearing be held for the determination of such issues of fact and law which may properly be determined at such hearing, and directing that a Writ of Habeas Corpus Ad Testificandum issue to the Warden of the United States Penitentiary, Marion, Illinois to produce said petitioner, CARMINE J. PERSICO, JR. at the Court for said hearing, his testimony and presence being both material and necessary;

LAW OFFICES
ROSENBERG, ROSENBERG
AND ROCKMAN

(C) and for such other and further relief as to this Court may seem just and proper.

DATED: Garden City, New York
December 3, 1975.

Yours, etc.,

MARC A. ROSENBERG,
ROSENBERG, ROSENBERG & ROCKMAN,
Attorneys for Petitioner
Office and Post Office Address
Two Hundred Garden City Plaza
Garden City, New York 11530
(516) 248-4300

TO:

HON. DAVID G. TRAGER,
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

CLERK OF THE COURT,
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- against -	:	AFFIDAVIT
CARMINE J. PERSICO, JR., et al.,	:	
Defendants.	:	60 CR 147

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

MARC A. ROSENBERG, being duly sworn, deposes and says:

I am a member of the firm of ROSENBERG, ROSENBERG & ROCKMAN, attorneys for the petitioner herein.

I make this affidavit in support of the application for relief pursuant to Title 28 U.S.C. Section 2255.

The pertinent facts are set forth in the Memorandum of Law and are incorporated herein as though fully contained herein. Petitioner's application for relief, it is respectfully submitted, is both meritorious and raises substantial questions of constitutional import. Inasmuch as it is contemplated that a hearing with regard to the factual assertions contained in these papers and in the affidavit of CARMINE J. PERSICO, JR. will become necessary, it is respectfully prayed that this Court seriously consider the issue of a Writ of Habeas Corpus Ad Testificandum in order that the petitioner will be present for the Court hearing when crucial and critical determinations with reference to his incarceration are duly considered and presented to the Court.

With reference to petitioner's affidavit dated November 26, 1975 annexed hereto, it is noted that your deponent was not, at the time of the events presented therein, counsel for the within petitioner. It is contemplated that petitioner's

LAW OFFICES
ROSENBERG, ROSENBERG
AND ROCKMAN

immediate availability for purposes of consultation with his attorneys will be critical in terms of the argument and determination eventually to be brought before the Court with respect to the relief requested herein.

Lastly, petitioner, at present, is incarcerated at the Federal correctional institution at Marion, Illinois. Without doubt, convenient communication for necessary matters of critical import cannot realistically be had if the petitioner is maintained at a facility some 1500 miles from the location of the Court where determination of important questions with regard to his incarceration and sentence will be had.

WHEREFORE, it is respectfully prayed that the relief requested herein be in all respects granted.

SWORN TO before me this
3rd day of December, 1975.

MARC A. ROSENBERG

Howard Schumsky

HOWARD SCHUMINSKY
NOTARY PUBLIC, State of New York
No. 30-4511350
Qualified in Nassau County
Commission Expires March 30, 1977

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State of Illinois)
(
County of Williamson)

AFFIDAVIT IN SUPPORT OF 2255 MOTION

I, Carmine J. Persico Jr. being duly sworn deposed and says;

That I arrived at the U.S. Penitentiary, Marion, Illinois on May 12th. 1972.

That during the latter part of May 1972 I was given an initial interview by my caseworker, Mr. Kennedy regarding my classification at Marion.

During the course of that interview I asked Mr. Kennedy what programs did he think I should participate in, in order to receive favorable consideration by the U.S. Board of Parole. Mr. Kennedy replied that I was classified a special offender by Washington and therefore no matter what I did in way of programming, I would not benefit. For parole was out of the question for me. Even if he wanted to reccommend parole he could not- for any decision concerning me had to be approved by the central office of the Bureau of Prisons. This included my visiting list and correspondents. He advised me to get a comfortable job and sit back and be prepared to expirate my fourteen year sentence. When I explained about the Judge giving me an A-2 number, he told me that meant nothing except to have my parole denied sooner.

On or about January 1974 I remarked to Mr. Kennedy about the possibility of some changes in the present parole laws that at that time were being publicized, he remarked "There might be some changes, but not for guys like you".

Your affiant believes that the above indicate that at no time was he ever going to be given meaningful consideration either by the Bureau of Prisons or the U.S. Board of Parole.

Respectfully Submitted

Carmine J. Persico

Carmine J. Persico, Jr.
Affiant

Subscribed and sworn to and given to me to be mailed this 26th of November 1975.

L. D. Thomas

Notary Public

1959
-3041

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
- against -		60 CR 147
	:	
CARMINE J. PERSICO, JR., et al.,	:	
Defendants.	:	

MEMORANDUM FOR PETITIONER

MARC A. ROSENBERG
ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for CARMINE J.
PERSICO, JR.
Office and P. O. Address:
Two Hundred Garden City Plaza
Garden City, New York 11530
(516) 248-4300

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The Guidelines of the U.S.Board of Parole, as Set Forth in 28 C.F.R., May Not be Relied upon in the Instant Matter in Denying Parole, with the Specific Objective of Defying the Sentence of the U. S. District Court, under Authority of 18 U.S.C. ¶4208 (a) (2).	
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

:

-against- : 60 CR 147

:

CARMINE J. PERSICO, JR., et al., :

:

Defendants.

- x

MEMORANDUM FOR PETITIONER

This memorandum is made in support of Petitioner's motion to be relieved from service of an illegal sentence imposed upon him by action of the United States Department of Justice through the activities of the United States Bureau of Prisons and the United States Board of Parole. The salient factors are as follows:

FACTS

CARMINE J. PERSICO, JR., was indicted in the above-captioned matter in April of 1960, being charged along with others of obstructing commerce by robbery and conspiracy, in

violation of 18 U.S.C. 1951. Following the fifth trial[1] on 60 CR 147, held in April and May of 1968, PERSICO was sentenced on the 6th day of June, 1969:[2]

> "to the custody of the Attorney General or his duly authorized representative who shall designate the place of confinement for the term of 14 years on each count, pursuant to Title 18 U.S.C. §§ 4208 (a) (2) ...
>
> The sentence to run concurrently."[3]

Thereafter and on or about the 27th day of January, 1972, defendant PERSICO commenced service of his 14-year 18 U.S.C. §§ 4208 (a) (2) sentence and on or about the 3rd day of July, 1972, at the United States Court House, Eastern District of New York, in the chambers of the Hon. JOHN F. DOOLING, JR., appeared Mr. and Mrs. CARMINE J. PERSICO, SR.; Mrs. CARMINE J. PERSICO, JR. and JAMES DRUKER, ESQ.

---

[1] Trial No. 1 in May, 1961, ended in jury disagreement; Trial No. 2 in June, 1961, resulted in conviction; said conviction was subsequently reversed on appeal. (See U.S. v. Persico, 305 F. 2d 534 (1962)); Trial No. 3, held in 1963 resulted in a mistrial as to the defendant PERSICO, and Trial No. 4, ending in April of 1964, resulted in conviction of defendants, but later reversed on appeal. (See U.S. v. Persico, 349 F. 2d (1965).

[2] See p. 45, "Sentencing Minutes," June 6, 1969, Hon. JOHN F. DOOLING, JR., U.S.D.C., E.D.N.Y.

[3] Id.

Assistant U.S.Attorney, for a conference concerning the PERSICOS' request for a reduction of sentence for CARMINE J. PERSICO, JR. On page 33 of the transcript of that in-chamber conference, the following colloquy took place:

"Mr. PERSICO, SR.:

> There wouldn't be no chance of my son's sentence ever being reduced?

THE COURT:

> It is what is called an (a) (2) sentence. I am sure I would never give a sentence that long if it wasn't. That means it is an indeterminate sentence. That is one day to 14 years, and he could be released at any time that the Board of Parole --"

It is strongly urged that the Hon. JOHN F. DOOLING, JR., before passing sentence upon CARMINE J. PERSICO, JR, fully considered all factors relevant and necessary; that the learned Judge was fully cognizant of the background, personal history, nature of the crime and nature of the activities in the alleged crime for which CARMINE J. PERSICO, JR., was convicted. Judge DOOLING not only presided at the fifth trial, lasting approximately six (6) weeks, but, additionally, had the full benefit of detailed pre-sentence reports and other information forwarded to him by the United States Department of Probation. It must be assumed, in addition to

the above, that Judge DOOLING took into account, in passing judgment of sentence upon CARMINE J. PERSICO, JR., that the Government put 60 CR 147 to trial five (5) times, during a period of indictment to incarceration covering some twelve (12) years. At the conclusion of the fifth trial, Judge DOOLING believed defendants, although convicted, should not be sentenced to incarceration at all, due to the fact of the possible lack of due process, taking all the proceedings together. However, the Second Circuit Court of Appeals did order Judge DOOLING to sentence the defendants and Judge DOOLING did so, giving PERSICO sentence under 18 U.S.C. §§ 4208 (a) (2), making him eligible for parole immediately upon incarceration.[4]

It is the defendant PERSICO's position that from the date of incarceration, January 27, 1972 to present, the United States Department of Justice, acting through the Bureau of Prisons, and the United States Board of Parole, has effectively RESENTENCED CARMINE J. PERSICO, JR., to a 14-year term of incarceration with no chance of parole. The United States Department of Justice has embarked on a course of conduct and has succeeded in usurping the sentencing function of the United States District Courts and the United

---

[4]See U.S. v. Dooling, 406 F. 2d 192, 198 (2nd Cir.) cert. denied, 395 U.S. 911 (1969).

"The Seventh Circuit recently observed, the

States District Court Judges, as well as to frustrate the intent of Congress in its passage of 18 U.S.C. §4208 (a) (2), the result being that there now exists no right for the United States District Court Judge to have an 18 U.S.C. §4208 (a) (2) sentence carried to its natural conclusion, as intended by the sentencing Judge, and by the Congress of the United States in the passage of such legislation, without the unqualified consent of the Department of Justice.

The frustration of Mr. PERSICO's 14-year, 18 U.S.C. §4208(a) (2) sentence has been accomplished in part by not meaningfully considering him for parole, as demanded in (a) (2) sentences.

PERSICO, after commencing service of his sentence, first met the Parole Board on or about June of 1972. In October of 1972, the Parole Board, by "Notice of Action," continued him without parole for an institutional review hearing in April of 1975. In the intervening period, the Department of Justice not only amputated the (a) (2) portion of the sentence by providing no meaningful parole consideration, but also embarked upon a course of conduct intended to not only lengthen the sentence of the United States District Court, but also to make more difficult the conditions of incarceration, not so intended by the Courts, by depriving PERSICO of many of the rights enjoyed by other prisoners under the Constitution of the United States. Although for the in-

tended purpose of rehabilitation, the United States Board of Parole and the Bureau of Prisons speak of keeing prisoners in touch with their relatives, PERSICO was moved -- without notice, hearing or reason, on or about April 14, 1972, from the Federal Penitentiary at Atlanta, Georgia, to the maximum security facility at Marion, Illinois -- effectively depriving him of frequent family visitations from PERSICO's aged parents,[5] and his five children. Additionally the Department of Justice limited the visiting list of CARMINE J. PERSICO, JR.. Significantly, and on or about the 28th day of April, 1972, the former Assistant Attorney General of the United States, HENRY PETERSEN, by secret memorandum,[6] issued "recommendations as to the parole poysibilities of CARMINE J. PERSICO, JR."

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[5] A number of applications have been made to the Department of Justice on behalf of Mr. and Mrs. CARMINE J. PERSICO, SR., to have CARMINE J. PERSICO, JR., moved to a Federal prison facility in closer proximity to New York, or within non-stop air service of New York, because of the age and lack of health of CARMINE J. PERSICO, SR.. All such applications (one within the last 60 days), have been turned down by the Department of Justice.

[6] On or about October 8, 1975, at the "en banc" appellate review of the U. S. Parole Board's denial of CARMINE J. PERSICO, JR.'s parole, this writer was told by the Regional Directors of said U. S. Parole Board that indeed a letter

While CARMINE J. PERSICO, JR., was being moved from Atlanta to Marion, and during the time Assistant Attorney General PETERSEN was issuing the memorandum concerning PERSICO's visiting list and chances for parole, PERSICO himself commenced and continued service of his sentence as a model prisoner, indicating good institutional performance and adjustment.[7] Additionally, PERSICO has gained, while in prison, an equivalent of a high school education by attaining his G.E.D. requirements, while also receiving favorable work reports in his job within the prison facility.

On April 3, 1975, a purported parole hearing was held at the Federal Penitentiary at Marion, Illinois[8] and, further, on or about the 14th day of April 1975, without any meaningful parole consideration at all, PERSICO's case was designated as "original jurisdiction,"[9] by the United

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issued by Assistant Attorney General PETERSEN in April,1972, did concern the possible parole of said CARMINE J. PERSICO, JR. The Regional Directors refused to divulge any further information.

7. See Progress Report, U. S. Bureau of Prison, dated 4/1/75.

8. Photocopy of said statement, in lieu of transcript, will be submitted to this Court, upon request.

9. First PERSICO was classified by the U.S. Bureau of Prisons as a Special Offender; this was done in contravention of the U. S. Constitution and reported cases of the Federal Courts, by depriving PERSICO, with no notice, hearing or reasons for this decision. Likewise, in violation of constitutional mandate, PERSICO was designated as original jurisdiction by the U. S. Board of Parole, without notice, hearing or reasons stated.

States Board of Parole and referred to the Regional Directors of said United States Board of Parole for their decision. On April 28, 1975 a decision was rendered by the National Appellate Board denying PERSICO parole and continuing him for three (3) years, without any further parole consideration at all. The full decision was as follows:

"Continue for Institutional Review Hearing in April, 1978."

"REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 5. You have been in custoday a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45 - 55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted.[11] There is not a reasonable probability that you would live and remain at liberty without violating the law because of your criminal history. BOARD POLICY LIMITS A CONTINUANCE TO NOT MORE THAN 36 MONTHS WITHOUT REVIEW. YOUR CONTINUANCE HAS BEEN LIMITED BY THIS POLICY.[12]

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[11] In Grasso v. Norton, 376 F.Supp. 116,119 (D.Conn.,1974), the Court found that 92-94% of all cases were decided within the guidelines.

[12] U.S. Board of Parole here states unequivocally that it will not even give the appearance of meaningful parole consideration in spite of the 18 U.S.C. §4208(a)(2) sentence, as issued by the Court and, of course,taking into consideraton PERSICO's unquestioned good institutional performance and adjustment.

> Your offense was part of a large-scale or organized criminal conpsiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer risk than indicated by the salient factor score."[13]

On August 28, 1975, Notice of Appeal to the Regional Directors of the United States Board of Parole (sitting "en banc"), was filed and on or about October 8, 1975, appeal was heard at Dallas, Texas.

On or about the 15th day of October, final decision was rendered affirming the April 28, 1975 decision, in total, save an adjustment of the salient factor score upwards to 7, changing the indicated range of incarceration for CARMINE J. PERSICO, JR., according to the Board of Parole's own guidelines from 45-55 months to a range of 35-45 months, with good institutional performance and adjustment.[14]

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[13] As indicated later in the within text, the U. S. Board of Parole on appeal revised PERSICO's salient factor score from 5 to 7. The significance of that revision put PERSICO in a recommended term of incarceration from 35-45, rather than 45-55 months.

[14] As of November, 1975, CARMINE J. PERSICO, JR., has served 47 months in Federal custody and, in addition, has approximately 100 days jail time credit, with unquestioned, unchallenged, good institutional performance and adjustment.

In spite of the fact that PERSICO is two (2) months over the Board of Parole's guidelines (without even considering good time and meritorious grants), and in spite of the fact that PERSICO is serving his term under an 18 U.S.C. §4208 (a)(2) sentence, which mandates "meaningful parole consideration," the Regional Directors, sitting "en banc," saw fit again, in affirming a lower decision, to state, in its reasons for affirmance of said denial:

> "Board policy limits a continuance to not more than 36 months, without review. YOUR CONTINUANCE HAS BEEN LIMITED BY THIS POLICY." [Emphasis supplied.]

The intention of the United States Board of Parole, at this juncture, is unmistakably clear, that is, the United States Board of Parole will not even, for the sake of appearance, give meaningful parole consideration to CARMINE J. PERSICO, JR., for the next three (3) years - - after April, 1978, because, according to Board policy, any continuance for consideration is limited to three (3) years. The Board of Parole will then give the impression of giving parole consideration to CARMINE J. PERSICO, JR. As is apparent, 36 months from April, 1975 will mean that CARMINE J. PERSICO, JR., will have served approximately 75 months in Federal custody, before even the appearance of meaningful parole consideration may occur. This would mean, in April, 1978, that CARMINE J. PERSICO, JR., would be 40 months over the United

States Board of Parole's own guidelines, as promulgated in 28 C. F. R. Taking into consideration the fact that the sentence of this Honorable Court was given under 18 U.S.C. §4208 (a)(2), intending PERSICO to be immediately considered for parole, with good institutional adjustment and performance, can leave no doubt as to the Board of Parole's future actions to ignore totally the wishes of the sentencing Court and the intent of the Congress of the United States in its passage of 18 U.S.C. §4208 (a) (2).

The integrity of the sentencing function of the United States District Court must be protected; the disregard of the Congress of the United States by the Department of Justice can no longer be tolerated, and the disregard of the constitutional due process rights of CARMINE J. PERSICO, JR., cannot be sanctioned by this Court.

POINT I

A SENTENCE, UNDER AUTHORITY OF 18 U.S.C. §4208 (a) (2), DEMANDS MEANINGFUL PAROLE CONSIDERATION.

THE SENTENCING COURT HAS CONTINUING AUTHORITY AND JURISDICTION UNDER 18 U.S.C. §4208(a)(2), AT ANY TIME DURING THE PERIOD OF SAID SENTENCE IF THE COURT CONCLUDES THAT ITS INTENTIONS HAVE NOT BEEN CARRIED OUT BY THE U. S. BOARD OF PAROLE.

POINT I - (Cont.)

THE GUIDELINES OF THE U. S. BOARD OF PAROLE, AS SET FORTH IN 28 C.F.R., MAY NOT BE RELIED UPON IN THE INSTANT MATTER IN DENYING PAROLE, WITH THE SPECIFIC OBJECTIVE OF DEFYING THE SENTENCE OF THE U. S. DISTRICT COURT, UNDER AUTHORITY OF 18 U.S.C. §4208(a)(2).

Eighteen U.S.C. §4208 (a) (2) was enacted in the year 1958, and presently reads as follows:[15]

"§4208. Fixing eligibility for parole at time of sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine." [Emphasis supplied.]

Former United States Representative EMANUEL CELLER, the chief author of 18 U.S.C. §4208 (a) (2), stated in Congressional hearings before passage of said statute, in part,

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[15] Added Pub. L. 85-752 §3, Aug. 25, 1958, 72 Stat. 846.

as follows:[16]

> "The second bill, House Joint Resolution 425, would authorize the sentencing judge to fix the maximum release date and also the time when a prisoner would become eligible for parole, provided the minimum date does not exceed one-third of the maximum. The present statute, which is Section 4208 of Title 18 of the United States Code, provides that a prisoner may not be eligible for parole until he has served one-third of the sentence imposed.
>
> "This is a purely arbitrary limitation and does not take into consideration the varying responses individual persons make to the rehabilitation program carried on in our Federal penal and correction institutions." [Emphasis supplied.]
> "
>
> "It frequently happens that a prisoner is ready for release before the statutory minimum for eligibility is reached. The sentencing judge has the benefit of the presentence report, is familiar with local conditions and any aggravating and mitigating circumstances involved." [Emphasis supplied.]
>
> "... In cases where he, the sentencing judge, believes the defendant might respond quickly to the rehabilitation program, the proposed bill would give the authority to fix an earlier eligibility date for release ..."

Defendant was sentenced June 9, 1969, by the Hon. JOHN F. DOOLING, JR., at the United States District Court for the Eastern District of New York. His Honor sentenced defendant to a 14-year term, pursuant to 18 U.S.C. §4208 (a)(2), making defendant eligible for "meaningful parole consideration" immediately upon incarceration.

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16 Taken from hearing before Subcommittee No. 3 of the Comm. on the Jud., House of Representatives, 85th Congress, 2nd Session, on H.J.Res.424, H.J.Res.425, Wed., April 30, 1958.

The guidelines for parole, enacted by the United States Board of Parole in the Code of Federal Regulations, were published for the first time on or about the 19th day of November, 1973, some four and one-half years after sentencing of Mr. PERSICO and almost two (2) years after commencement of PERSICO's term of Federal incarceration.

Judge DOOLING, in passing sentence, could not have had any knowledge of the guidelines now in force and purportedly followed by the United Stated Board of Parole today. It must be concluded that the learned Judge sentenced CARMINE J. PERSICO, JR., with the "expectation" that he would be meaningfully considered for parole under the then existing statute of sentence -- 18 U.S.C. §4208 (a) (2).

For the Board of Parole to apply their guidelines retroactively to sentences issued by the United States District Court Judges would be to frustrate and obstruct the sentencing function of the United States District Courts of the United States. The denial of parole opportunity and meaningful parole consideration to Mr. PERSICO, if there should be such denial, must be based on criteria for parole as existing in June 6, 1969 -- the time of sentencing of said defendant.

Significantly, it should be noted that on September 5, 1975, the Department of Justice and the United States Parole Board issued revised rules as published in the Federal Register. At 28 C.F.R. Page 41329 (Vol. 40,173) it was stated as follows:

> "(C) EVALUATIONS OF OTHER COMMENTS RECEIVED. The comments received by the Board following publication of its proposed rule-making on December 31, 1974, raised a number of difficult issues regarding paroling policy. Many of these issues are valid concerns, even though the specific proposals offered by the writers were not acceptable to the Board at this time. These issues will continue to be given serious attention in the future.
>
> (1) THE PAROLING POLICY GUIDELINES. Nearly every comment received referred to some aspect of the Board's Paroling Policy Guidelines at § 2.20.
>
> Generally the guidelines were criticized for failing to consider with sufficient emphasis, rehabilitation or institutional progress. However, one comment stated that although prison performance is relevant to the parole decision, the Board's guidelines correctly de-emphasize rehabilitative factors which social sience suggests can neither be detected nor measured. (Emphasis supplied).

We support the development of detailed guidelines for decision making, not only because of Board's stated goals, but also because of § 2.20 as applied by the Board serves other commendable purposes. (See Paroling Policy Guidelines 28 C.F.R. 2.20, Fed. Reg. Vol. 40, 173, Fri., September 5, 1975, P. 41333). FIRST, BY ITS CHOICE OF CRITERIA, THE BOARD HAS MADE CLEAR THAT IT HAS DE-EMPHASIZED REHABILITATIVE FACTORS AS A CONDITION OF RELEASE. Extensive social science research strongly suggests that rehabilitation can neither be observed, detected or measured. AN INMATE's INSTITUTIONAL BEHAVIOR

AND PERFORMANCE SHOULD BE RELEVANT TO THE PAROLE DECISION, HOWEVER, AND WE SUPPORT THE BOARD RULE ALLOWING THIS FACTOR TO JUSTIFY DECISIONS OUTSIDE THE RANGE INDICATED BY THE GUIDELINES ... "

The dismissal of the use of rehabilitation factors (institutional performance and adjustment in the granting of parole is inapposite with the intent of Congress in its passage of 18 U.S.C. 4208 (a) (2). Its use only to allegedly "justify" decisions denying parole outside of the guidelines is not what could have been intended by the sentencing Court.

The legislative intent of §§ 4208 (a) (2) is clear, in that parole under an (a) (2) sentence should be based upon a prisoner's performance and response to the institutional programs. Accordingly, a reading of petitioner's special progress report, dated April, 1975[16] should leave no doubt in the Court's mind that Mr. PERSICO's overall adjustment has been deemed good. He has maintained a clear conduct record, has received favorable work and housing reports, and has become active in self-improvement programs. In addition, PERSICO holds a prison job and has also completed his high school equivalency requirements by attaining his G.E.D. award, after attending school at the penitentiary in Marion. Further, as noted in the statement in lieu of transcript, submitted at the purported parole hearing held on April 3, 1975, PERSICO submitted that he can receive

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[16] Photocopy of which is annexed hereto and made part hereof.

employment outside the State of New York, and is willing to relocate with his wife and children, away from the New York area in which his prior conflicts with law enforcement have occurred.

In spite of all of the above, the United States Board of Parole will not even give the appearance of meaningful parole consideration until April, 1978, and this is in and of itself a per se violation of the sentence as issued by the United States District Court under 18 U.S.C. § 4208 (a) (2).

In Kortness v. United States, 514 F.2d 167 (1975). the Eighth Circuit met with a similar problem to that presented here. Plaintiff Kortness was serving a three-year prison term, pursuant to 18 U.S.C. § 4208 (a) (2). Kortness began serving his sentence at the Federal Correctional Institution, Sandstone, Minnesota, on or about the 29th day of November, 1973. He applied for parole on January 25, 1974, and was given a hearing on March 19, 1974. Following that hearing, the Parole Board, on April 15, 1974, issued an order denying Kortness parole and determining that he would receive no further consideration for parole during his prison term. Kortness then brought an action, pursuant to 28 U.S.C. § 2255, claiming that he had pleaded guilty to a crime, in return receiving a sentence under 18 U.S.C. § 4208 (a) (2), and not knowing that under Parole Board guidelines he would, in effect, be non-parolable. Kortness contended that because of

work and housing reports and was routinely

these guidelines (the guidelines were published the same day Kortness was sentenced, without the knowledge of either Kortness or the sentencing Court), he is compelled to serve more time in prison than contemplated by the sentencing Judge.

On May 2, 1974, the District Court denied Kortness' § 2255 petition, stating that the Court is without authority to direct the Board in the discharge of its responsibility and is without authority to modify the sentence imposed.

The Court of Appeals for the Eighth Circuit reversed and remanded for resentencing, holding that a sentencing Court does have "continuing authority and jurisdiction" at any time during the period of sentence imposed to modify or reduce the sentence imposed, if the Court concluded that its intentions have not been complied with by the parole board.

Writing for the Court in Kortness, Judge BRIGHT stated:[17]

> "We agree that the guidelines serve to predict with reasonable accuracy the actual time that would be served by a federal prisoner under a § 4208 (a) (2) sentence. However, in this case the sentence was imposed the same day as the initial publication of the guidelines.[18] Without access to these guidelines, the SENTENCING JUDGE WAS ENTITLED TO ASSUME THAT DEFENDANT KORTNESS WOULD RECEIVE MEANINGFUL CONSIDERATION FOR PAROLE AT AN EARLY DATE OR AT LEAST UPON COMPLETION OF ONE-THIRD OF HIS SENTENCE." (Emphasis supplied; citations omitted.)

Judge BRIGHT went on to state further:

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[17] 514 F. 2d at 170

[18] In Persico, stating the above, sentencing occurred approximately four years prior to the enactment of the guidelines.

"The Seventh Circuit recently observed, the judge who sentences a prisoner under §4208 (a)(2) ordinarily contemplates that at an appropriate time before the one-third point in the sentence, the Parole Board will exercise a meaningful judgment upon, i.e., give 'serious consideration' to, the question of whether the prisoner should be paroled before the one-third point. (Garafola v. Benson, 505 F. 2d 1212, 1217-18 (7th Cir.1974).)"

The Second Circuit Court of Appeals, in U. S. A. v. Slutsky, April 18, 1975, recently ruled on a timely Rule 35 motion for a resentencing, upon the grounds of mistake of fact in sentencing, as relating to the United States Board of Parole's administration of 18 U.S.C. §4208 (a)(2). The pertinent facts of that case are as follows:

BEN and JULIUS SLUTSKY were tried by jury in the United States District Court for the Southern District of New York and convicted of attempted income tax evasion and of filing false partnership tax returns.

The SLUTSKYs filed a timely Fule 35 motion for reduction of sentence before Judge MacMAHON and were denied said relief, without a hearing. The SLUTSKYs' contention was that the hearing judge sentenced them under a mistake of facts, as relates to the United States Board of Parole's administraation of 18 U.S.C. §4208 (a) (2) -- the provision under which they were sentenced. The SLUTSKYs argued that the District Court must have employed an (a) (2) sentence with the expectation the Board of Parole would consider them for early release, taking into account their prison perfor-

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mance and other relevant factors -- they concluded, however, that the Board of Parole had ignored the possibilities for early release which §4208 (a) (2) provides.

In a well-reasoned opinion, Judge MOORE stated:

> "We are convinced that the parole consideration for the Slutskys is likely to depart substantially from what we assume were the reasonable expectations of the district judge. Accordingly, we think a remand for resentencing is appropriate in order to allow the district judge an opportunity to reconsider the original sentence in light of these new circumstances.
>
> "We refer particularly to the Board of Parole's newly issued parole decision-making guidelines, 28 C.F.R. §2.20 (1974), and related regulations. Of interest as well for the light they shed upon Board policies are recent cases dealing with the habeas corpus petitions of §4208(a)(2) prisoners aggreived by the failure of the Board of Parole to consider them for parole until well after the one-third point in their sentences, the point when regular prisoners are considered. E.G. Garafola v. Benson, 505 F. 2d 1212 (7th Cir. 1974); Stroud v. Weger, 380 F.Supp. 897 (M.D. Pa., 1974); Grasso v. Norton, 371 F. Supp. 897 (D. Conn. 1974) (Grasso I); Grasso v. Norton, 376 F. Supp. 116 (D.Conn., 1974) (Grasso II), appeal pending, No. 74-1222(2nd Cir.). Although the guidelines were available at the time of the appellants' Rule 35 motion,[19] they were not cited in support of it. Nor has the use of the guidelines for (a)(2) prisoners been well-publicized, at least among judges in this Circuit, who remained largely ignorant of the practice until well after

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[19] Citations omitted.

the denial of the instant motion on July 24, 1974. ..."

The United States Board of Parole has unequivocally and boldly put forth its position re CARMINE J. PERSICO, JR. -- No parole consideration at all until April 1978 -- and then the only reason the Parole Board will even consider making an attempt at appearing to consider parole is because

"Parole Board policy limits a continuance to no more than 36 months."

And, as stated by the Parole Board in its final October 15, 1975 decision to CARMINE J. PERSICO, JR.:

"Your continuance has been limited by this policy."

In April, 1978, CARMINE J. PERSICO,JR., with a salient factor score of 7, calling for 35-45 months of incarceration, will have been incarcerated for some 75 months, with good institutional performance and adjustment. This decision of the United States Board of Parole not to consider CARMINE J. PERSICO, JR. at all for parole, coupled with the sentence of the United States District Court under 18 U.S.C. §4208 (a)(2), could not have been the intent of the sentencing Court in July, 1969 when it sentenced PERSICO -- long before the promulgation of these guidelines.

CARMINE J. PERSICO, JR., is in service of an illegal sentence. Justice demands that this Honorable Court resentence CARMINE J. PERSICO, JR., to a term of imprisonment consistent with its intentions and powers.

POINT II

U. S. BOARD OF PAROLE'S "REASON" FOR DENIAL OF PAROLE AND ITS CONTINUATION OF DEFENDANT FOR THREE YEARS BEFORE ANY CONSIDERATION, EVIDENCES THE U.S. BOARD OF PAROLE'S INTENTION NOT TO ABIDE BY 18 U.S.C. §4208(a)(2) SENTENCE, AS ISSUED BY THE UNITED STATES DISTRICT COURT.

CARMINE J. PERSICO, JR. submits that he has been denied due process, by virtue of the United States Board of Parole's failure to state specific cogent and supportable reasons for a denial of parole and, instead, has rather been given "boiler-plate" terminology and a re-hash of the Federal Code of Regulations on parole, in an endeavor to justify the United States Board of Parole's usurpation of the United States District Court's function of sentencing.

An exmination of the decision for reasons given to PERSICO to override the intent of Congress and the power of the Federal Courts, is as follows:

Reason No. 1: Your offense behavior has been rated as "very high severity."

PERSICO's position: This is not a reason. This is a quote of the Parole Board's own guidelines as promulgated in 28 C.F.R. 2.20. Because an offense is classified as "very high severity," does not establish a reason for not granting parole. The Hon. JOHN F. DOOLING, JR., who sentenced Mr. PERSICO was certainly aware of the type of offense for which PERSICO was convicted. Judge DOOLING saw fit, with knowledge of the type of crime for which PERSICO was convicted, to make defendant eligible for parole, pursuant to 18 U.S.C. §4208 (a)(2).

Reason No. 2: You have a salient factor score of 7.

PERSICO's position: A salient factor score of 7 indicates a term of incarceration, according to the Board's own guidelines, of anywhere from 35 to 45 months. PERSICO is already over these guidelines and is yet to be given a substantial reason for the Board's departure from its own guidelines, which were not even in existence at the time of the receipt of PERSICO's §4208 (a) (2) sentence from the United States District Court. Additionally, a statement as to PERSICO's salient factor score is hardly a reason, but is merely a recitation of the Board's own guidelines.

Reason No. 3: You have been in custody a total of forty-three (43) months.[20] Guidelines established by the Board for adult cases which consider the above factors indicate a range of 35-45 months to be served before release, with good institutional performance and adjustment.

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[20] The Board of Parole's calculation of 43 months is incorrect. PERSICO commenced Federal incarceration in January, 1972; the final decision of the Board of Parole having been issued on October 15, 1975, would add to a total period of incarceration of 45 months, rather than 43 months.

PERSICO's position: There is no question as to PERSICO's good institutional performance and adjustment.[21] Again, the Board is merely re-stating its own published guidelines, which is hardly a reason to justify usurpation of the intent of the Congress and the powers of the United States District Court in their sentencing.

Reason No. 4: After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted.

PERSICO's position: This is not a reason but a conclusion. More than likely, the relevant factors and information are contained in the form of confidential memoranda and/or directoves, such as that issued by Assistant Attorney General PETERSEN, none of which PERSICO has knowledge of (although duly demanded), nor has PERSICO ever had an opportunity to controvert same. PERSICO does believe that such memoranda,however, issued by Assistant Attorney ;eneral PETERSEN, has had an adverse effect upon any chance for meaningful parole consideration.

Reason No. 5: There is not a reasonable probability that you will live and remain at liberty, without violating the law, because of your long criminal history.

PERSICO's position: This is not a reason, but merely states a conclusion. The wording of this "reason" is taken almost verbatim from 28 C.F.R. 2.13(2), which reads:

> "(2) There does not appear to be a reasonable probability, at this time, that the prisoner will live and remain at liberty, without violating the law."

Further, as to "...because of your long criminal history," an examination of Mr. PERSICO's record will reveal, at most, two (2) other convictions, those being for misdemeanors. Clearly, this "long criminal history" is an unfounded conclusion and certainly Mr. PERSICO's entire criminal history was before the Court and within the knowledge of Judge DOOLING, at the time of sentencing.

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[21] See copy of Progress Report annexed hereto.

Reason No. 6: Board policy limits a continuance for not more than 36 months without review. Your continuance has been limited by this policy.

PERSICO's position: Again, we find another mere statement of Parole Board policy -- hardly a reason. Further, PERSICO contests Board policy in this respect as being unconstitutional in light of his 18 U.S.C. §4208 (a) (2) sentence and in direct defiance of the sentencing powers of the United States District Courts, as given to them by the United States Congress. It is submitted that such a policy by the United States Board of Parole is not only an invalid reason, but no reason at all.

Reason No. 7: Your offense was part of a large-scale or organized conspiracy or an ongoing criminal enterprise.

PERSICO's position: Again, we are not give a reason, but a conclusion. This information, if true, was certainly before the Court at the time of sentencing and after the learned Judge had officiated over a five-week trial, and had before him presentence reports and other related information. Evidence that there is no question that this reason was in the Judge's mind and was considered by the Judge before issuing an (a) (2) sentence, can be found from the minutes of the in-chambers conference between the Assistant United States Attorney DRUKER, and the parents and wife of CARMINE J. PERSICO, JR. At that conference, held July 3, 1972, Judge DOOLING stated, at page 21:

> "... the theory of the case expressed in the evidence and at the trial, was that he [CARMINE J. PERSICO, JR.] was the head-man; that he was the key in the whole thing."

Significantly, I am sure Judge DOOLING was aware that there were a number of other co-defendants charged under 60 CR 147, at least three others of which were convicted for the same crime.

8. Annexed hereto and made a part hereof as Exhibit "B"

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Reason No. 8: An unusually sophisticated and professional manner was evident in the planning and commission of the offense.

PERSICO's position: Certainly, the trial Judge was knowledgeable, having heard all the evidence over a course of five (5) weeks, to judge the sophistication and professional manner (if it existed) in the planning and commission of the offense. Judge DOOLING, weighing this information with all other factors, saw fit to grant PERSICO an (a) (2) sentence.

The language given in the above for denial of parole to PERSICO in the United States Board of Parole's endeavor to resentence PERSICO to a sentence different than that issued by the United States District Court, however, exactly tracks the language as set forth in C.F.R. §2.13, or merely states conclusions of facts, all such facts having been before the sentencing Court and, of course, conclusions based on mysterious and unlawful information -- the contents of which the United States Board of Parole refuses to divulge.

It should be noted that 28 C.F.R. 2.18(b) states:

> "In accordance with Section 2.18, the reasons for parole denial may include, but are not limited to the following (listed) reasons, WITH FURTHER SPECIFICATION WHERE APPROPRIATE." [Emphasis supplied.]

Obviously, in Mr. PERSICO's case, the Board does not even see fit to follow its own published guidelines in its endeavor to override the wishes of the United States District Court in its sentencing function. Use of the mere pro forma

language as set forth in 28 C.F.R. 2.18, along with conclusions, supposedly disguised as reasons makes a mockery of the requirements that a prisoner be given reasons for denial of parole. See King v. United States, 492 F. 2d 1337 (7th Cir. 1974).

In Stassi v. Hogan, Judge EDENFIELD, Northern District of Georgia, June 9, 1975, stated:

> "...Such language was rejected in Billiteri v. United States Board of Parole, 3 Prison Law Reporter 308 (W.D.N.Y.) - 74-365, November 16, 1974, in which the District Court heeded the ruling of the Second Circuit that the statement of reasons required in a parole denial must be such as 'will permit the reviewing court has adopted a valid criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations.' See U. S. ex rel. Johnson v. Chairman, 500 F. 2d 925 (2nd Circuit 1974, vacated as moot 419 U.S. 1015 (1974)). See also Wren v. United States Board of Parole, 389 F.Supp. 938, 942, N.2 (N.D.Ga. 1975). Such language as that used here was also found insufficient in Candarini v. Attorney General, 369 F. Supp. 1132, 1137 (E.D.N.Y. 1974) where the Court required that the Board set out facts and reasons sufficient to enable the inmate to know why he has been denied parole and what he can do to better regulate his future conduct.
>
> "If the purported rehabilitative goals of the Penal and Parole systems are to be served, the prisoner must be informed of the reasons underlying the denial. Consequently, the prisoner will be enabled to conform his institutional conduct to the standards accepted by the Board. See Mower v. Britton, 504 F.2d 396, (10 Cir. 1974).

> Use of boiler-plate language which is not related in some specific way to an individual's case does not serve these ends. It gives the appearance of unfairness and arbitrariness, and if there is to be respect for the parole system, the appearance of fairness is second in importance only to fairness in fact."

(See, also, Farries v. U. S. Board of Parole, 74-116-E, U.S.D.C. E.D. Ill.)

It is submitted that CARMINE J. PERSICO, JR. is the victim of unfounded information, reasons and directives contained in his parole file, with the specific objective of depriving him of any meaningful parole consideration,all in violation of the sentence of this Honorable Court.

Mr. PERSICO further believes that certain government agencies, namely, the United States Department of Justice, through memoranda such as that submitted by former Assistant Attorney General PETERSEN, are directed with the specific purpose of resentencing him to a term of incarceration more in thinking with the wishes of the United States Department of Justice than with the wishes and intent of the District Court of the United States, under authority delegated to it by action of the Congress of the United States. CARMINE J. PERSICO, JR. has been denied due process by all the above and now finds himself in service of an illegal sentence and it is encumbent upon the United States District Court to rectify this injustice both to the defendant and to the attack upon the powers of the United States District Court.

CONCLUSION

CARMINE J. PERSICO, JR. IS CURRENTLY IN SERVICE OF AN ILLEGAL SENTENCE, HAVING BEEN RESENTENCED BY THE U.S. DEPARTMENT OF JUSTICE TO A TERM OF INCARCERATION OTHER THAN THAT ORDERED BY THE UNITED STATES DISTRICT COURT. THIS COURT MUST ISSUE ALL ORDERS NECESSARY AND APPROPRIATE TO MODIFY AND REDUCE THE LENGTH OF INCARCERATION OF PERSICO TO REFLECT THE INTENTION OF THE COURT IN JULY, 1969, UNDER THE SENTENCING STATUTE 18 U.S.C. §4208 (a)(2). THIS COURT SHOULD ADDITIONALLY MAKE ALL ORDERS NECESSARY AND APPROPRIATE TO PROTECT THE INTEGRITY OF THE UNITED STATES DISTRICT COURT AND THE INTENTION OF CONGRESS IN POWERS SO DELEGATED TO THE UNITED STATES DISTRICT COURTS.

Respectfully submitted,

MARC A. ROSENBERG
ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for CARMINE J. PERSICO, JR.
Office and P. O. Address:
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

A141

Date April 1975

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

U. S. Penitentiary, Marion, Illinois
INSTITUTION

Inmate Reviewed and/or Received a Copy

SIGNATURE AND DATE

PROGRESS REPORT

IRH XX Interim Annual Other

Name: PERSICO, Carmine J. Jr. Reg. No. 74666-158

Offense: Theft from I/S Shipment Age: 41

Sentence: 14 Years (a)(2) Began: 1-27-72 Months Served: 38

Days EGT: 146 Days FGT: 0 Tentative Release: 10-20-80

Last Board Action and Date: 10-11-72 Continue with IRH, April, 1975

Detainers: None on file

Co-Defendants: See below

Co-Defendants: Hugh McIntosh, USP - Atlanta, Ga., - 9 years
S. Albanese, 5 years probation.
J. Magnasco, deceased.
R. Spero, 5 years probation.
G. LaFante, acquitted.
G. Vacarro, 7 years.
D. Iorio, dismissed.
J. Loretta, dismissed.
S. Scarpa, dismissed.
G. Scarpa, dismissed.
J. Hassett, disposition unknown.
A. Belpriore, disposition unknown.
A. Russo, disposition unknown.

NEW INFORMATION

No new information.

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INSTITUTIONAL ADJUSTMENT

Goals established for Persico were to raise his level of academic skills, acquire a salable skill and involvement in a group counseling program. He is currently enrolled in GED preparation classes through the Education Department and working toward completion of GED requirements. He has an IQ of 110 and a grade point level of 7.1 based on Stanford Achievement Testing of 3-17-72. He receives counseling from correctional counselors and his case manager on an individual basis whenever a situation warrants such counseling.

Persico was originally committed to Atlanta on 3-10-72 for the serving of his present sentence. He was transferred to Marion on 5-12-72 as a result of institutional classification. He was initially assigned to the athletic detail, where he performed general maintenance duties. However, he was assigned to the radio room on 5-30-74, where he currently remains. Work reports have always been of a satisfactory nature and he is considered to respond to supervision in a favorable manner. In his unit, his personal and quarters sanitation habits have been rated as good. He is considered to be a quiet resident who does not present problems to his work or housing unit supervisors. Since transferring to Marion, Persico has been out on writ for extended periods of time. These periods have been from 11-18-72 to 5-3-73 and 5-27-73 to 10-27-73. He has recently become involved in the Education Department by working toward his GED requirements. He has maintained a clear conduct record since his arrival. Since his arrival, Persico's overall adjustment has been deemed as good. Persico is assigned to light duty due to a deformity he has on his right wrist, which involves a loss of sensation. Other than the above, he is considered to be in good health. He denies the use of drugs or alcohol.

RELEASE PLANNING

Upon release, Persico plans to reunite with his wife and children in Brooklyn, New York. He states that he has been promised employment with the Allied Tactless Company in Brooklyn.

Release Plans:

A. Residence--with wife and children, Mrs. Joyce Persico, 8420 11th Avenue, Brooklyn, N.Y.
B. Employer--with Allied Tactless Company, Brooklyn, N.Y.
C. Advisor--Bishop Andre Penachio, 256 Summit Avenue, Allen Heights, N.J.
D. USPO--James F. Haran, Chief, 307 U. S. Courthouse, Brooklyn, N.Y. 11201

EVALUATION AND RECOMMENDATION FOR RELEASE

Persico is a 41 year old offender who is serving a 14 Year sentence for Theft from Interstate Shipment. He has now served approximately 38 months of this confinement. Although he has spent a good deal of time out on writ, his overall adjustment since being incarcerated on the above charge has been considered as good. Since his incarceration, he has maintained a clear conduct record, has received favorable

BEST COPY AVAILABLE

SPECIAL PROGRESS REPORT

Committed Name PERSICO, Carmine J. Jr. Reg. No. 74666-158 Date April 1975

work and housing reports and has recently become active in self-improvement programming.

Recommendation: In view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted.

Dictated by: C. A. Craig
C. A. Craig, Case Manager

2-25-75/ac

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

CARMINE J. PERSICO, JR., : 75 C 2033
: (60 CR. 147)
-against- : MEMORANDUM
: and
UNITED STATES OF AMERICA : ORDER
:

- - - - - - - - - - - - - - - - - - - -X

The nature of the arguments advanced to show that the Board of Parole has abused the discretion vested in it by 18 U.S.C. 4203 does not suggest that an evidentiary hearing rather than a review analogous to APA review is sought (cf. 5 U.S.C. 701(a)(2); 18 U.S.C. 4203; is Bozell v. United States, 4th Cir. 1952, 199 F.2d 449, obsolete?) However, on the argument of the motion a decision will be made on the need for an evidentiary hearing.

The Government will be allowed until January 20, 1976, to submit its opposing papers.

It is so ORDERED.

Brooklyn, New York

December 24, 1975. JOHN F. COOLING, JR.

U. S. D. J.

----------X

CARMINE J. PERSICO, JR.

75 C 2033

-v-

UNITED STATES OF AMERICA

----------X

REPLY MOTION OF UNITED STATES OF AMERICA

The United States of America, by Fred F. Barlow, Special Attorney, Department of Justice, in response to the motion of Carmine J. Persico pursuant to Title 28, United States Code, Section 2255, moves (1) that this motion be heard without an evidentiary hearing, and (2) for leave to file a supplementary memorandum in response, based upon the annexed affidavit.

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: F. F. Barlow
FRED F. BARLOW
Special Attorney
U.S. Department of Justice

EASTERN DISTRICT OF NEW YORK

----------X

CARMINE J. PERSICO, JR. 75 C 2033

-v-

UNITED STATES OF AMERICA

----------X

AFFIDAVIT IN SUPPORT OF GOVERNMENT'S MOTION IN RESPONSE

Fred F. Barlow, being duly sworn, says:

1. He is a Special Attorney of the Department of Justice, duly appointed and acting as such, and he has been assigned the defense of this case.

2. In late August or early September, 1975, he was advised by a Special Agent of the Federal Bureau of Investigation that a reliable confidential informant of the said agent (whose identity cannot be disclosed at this time to protect the safety of the said informant) had told the said agent that Hugh McIntosh (the petitioner's co-defendant in 60 CR 147) was going to work for petitioner's law firm as a law clerk, and that McIntosh was working on a new petition for Mr. Persico. Affiant avers that the Government should have a reasonable time to respond to the motion in this case, considering the length of time petitioner's law firm has spent in its preparation.

2. The Brooklyn Strike Force received a copy of this motion on December 11, 1975 at about 4:30 p.m.

3. Although affiant had expected to complete over the last weekend the Government's memorandum in response, on Friday, December 19, 1975, at about 4:45 p.m. Chief Judge Mishler set the case of United States v. Joseph Simonelli, 75 CR 341, down for trial on December 22, 1975, at 10 a.m., and affiant had to prepare for trial (the said defendant waived his rights to speedy trial on December 22, 1975).

4. Petitioner's affidavit of November 26, 1975, discloses that he was told by his case worker that any decision regarding the petitioner had to be approved by the central office of the Bureau of Prisons. The only other factual allegations related in petitioner's affidavit concern only the reported decisions at the various levels of review of his parole application. The Government submits that this case thus can be decided without the need either for an evidentiary hearing, or the petitioner's presence.

5. In the short excerpt of the colloquy July 3, 1972 concerning petitioner's reduction of sentence, several salient facts are excluded. Affiant was told by James O. Druker, Assistant United States Attorney, Eastern District of New York, on December 22, 1975, that this Court denied the reduction motion, that this Court was aware of the organized crime ramifications of the case, and that the Court told the assembled persons that it would consider a reduction if Mr. Persico began to cooperate with the United States. Affiant knows from regular communication with the Federal Bureau of Investigation, as late as December 22, 1975, that such cooperation has not yet been offered. Affiant still has not received the closed case, 60 CR 147, from the Federal Records Center, but will supplement this paragraph with the appropriate transcript when it is available.

WHEREFORE, the Government respectfully requests the relief prayed in its annexed motion.

FRED F. BARLOW
Special Attorney
U.S. Department of Justice

Sworn to before me this
22nd day of December, 1975

Richard L Stamler

NOTARY PUBLIC
STATE OF N.Y. 30-3610090
QUALIFIED NASSAU
TERM EXPIRES 3-30 77

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

----------x

CARMINE J. PERSICO, JR. : 75C2033

- against - :

UNITED STATES OF AMERICA : AFFIDAVIT

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

MARC A. ROSENBERG, being duly sworn, deposes and says:

1. That I am a member of the firm of ROSENBERG, ROSENBERG & ROCKMAN, with offices at Two Hundred Garden City Plaza, Garden City, New York, attorneys for petitioner Carmine J. Persico, Jr.

2. This affidavit is made in support of petitioner's motion for an evidentiary hearing under authority of 28 U.S.C. Section 2255 for a reduction of sentence; for the issuance of a writ of habeas corpus ad testificandum ordering the presence of the petitioner at any and all Court hearings -- his testimony being both material and necessary; and, further, this affidavit is made in opposition to the Government's motion that said 2255 motion be considered without an evidentiary hearing, and that the United States be granted a further extension of time to respond.

LAW OFFICES
NBERG, ROSENBERG
AND ROCKMAN

3. The 2255 motion and supporting memoranda on behalf of the petitioner, Carmine J. Persico, Jr., were duly served on the

United States Attorney's Office for the Eastern District of New York on December 4, 1975, at 11:25 A.M. Annexed hereto and made a part hereof as Exhibit "A" is a photocopy of a receipt by the United States Attorney's Office duly signed by one, Paula Geramone.

4. That the affidavit of Fred F. Barlow, Special Attorney, United States Department of Justice, is erroneous, misleading and irrelevent, with the intended purpose of straying from the pertinent issues.

5. That paragraph 2nd of the affidavit of Fred Barlow, Esq. is absurd and a laughable attempt to imply wrongdoing on the part of petitioner, petitioner's attorneys, or one, Hugh McIntosh, a co-defendant in 60CR147.

6. That your affiant solely and only researched, drafted and wrcte the 2255 motion herein and its supporting memoranda. Further, your affiant did so on or about the middle of November, 1975, after long in-person consultations with Carmine J. Persico, Jr., at the penitentiary in Marion, Illinois, and subsequent to participation in all parole procedures in behalf of said Carmine J. Persico, Jr., from April, 1975 (including parole hearing at the penitentiary, National Appellate Board proceedings and a personal appearance on or about the 8th day of October, 1975 at Dallas, Texas, for oral argument of petitioner's appeal before the regional directors -- sitting en banc).

LAW OFFICES
NBERG, ROSENBERG
AND ROCKMAN

7. Mr. Barlow's statement in paragraph 2 that:

> "...In late August or early September, 1975 he was advised by a special agent of the Federal Bureau of Investigation that a reliable confidential informant of the said agent (whose identity cannot be disclosed at this time to protect the safety of the said informant) had told the said agent that Hugh McIntosh (the petitioner's co-defendant in CR147) was going to work for petitioner's law firm as a law clerk, and that McIntosh was working on a new petition for Mr. Persico"

illustrates Mr. Barlow's futile attempt [illegible] Court and justify application for another ex[illegible]ne (one week's adjournment heretofore having been duly granted by the Honorable John F. Dooling on or about the 15th day of December, 1975, for the Government to respond up to and including the 22nd day of December, 1975). Significantly, Mr. Barlow need not have relied upon a "supposed" confidential informant (who allegedly fears for his safety) concerning proposed employment by you[illegible] affiant of one, Hugh McIntosh. Mr. Barlow would have been better advised to have contacted James F. Haran, Chief Probation Officer, Eastern District of New York, located on the third floor of the United States Court House, at 225 Cadman Plaza East, Brooklyn, New York, to ascertain all information concerning Mr. McIntosh. If Mr. Barlow had done so rather than contacting a supposed confidential informant, Chief Probation Officer Haran would have been able to show him all pertinent documented material concerning such employment.

LAW OFFICES
BERG, ROSENBERG
ND ROCKMAN

8. Annexed hereto and made a part hereof as Exhibit "B" is a photocopy of your affiant's letter dated September 9, 1975, requesting written permission for employment of Hugh McIntosh after an in-person meeting with Michael J. Gillen, Parole Officer.

9. Annexed hereto as Exhibit "C" is a photocopy of a letter dated September 17, 1975, on the stationery of the United States District Court for the Eastern District of New York, Probation Office, granting permission for employment of Mr. Hugh McIntosh on condition that the Supreme Court Appellate Division, Second Department, so approve.

10. Annexed hereto as Exhibit "D" is photocopy of letter dated September 30, 1975, addressed to Irving N. Selkin, Esq., Clerk, Appellate Division, Second Department, requesting permission for employment of said Hugh McIntosh. On October 9, 1975, the Honorable Frank A. Gulotta, Presiding Justice, Supreme Court of the State of New York, Appellate Division, Second Department, responded. Annexed as Exhibit "E" is a photocopy of said response. Further, on or about the 30th day of October, 1975, and for reason that your affiant could not receive unqualified consent upon the part of the Supreme Court, Appellate Division, Second Department, advised the Honorable Frank A. Gulotta and James F. Haran, Chief Parole Officer, by letter, a photocopy of which is annexed hereto as Exhibit "F", that your affiant withdrew the employment offer to Hugh McIntosh. Because of the above, Hugh

McIntosh was not employed at your affiant's law offices and, in fact, did not work on the preparation, drafts or research of the 2255 motion and its memorandum of law.

11. The United States Attorney's Office has had since December 4, 1975 to intelligently respond to the moving papers of petitioner, and hence petitioner vehemently opposes any further extension of time.

12. Petitioner's affidavit sworn to November 26, 1975 concerns factual allegations both necessary and pertinent to the outcome of the 2255 motion. Such evidence, petitioner submits, is needed by way of testimony at an evidentiary hearing for the Court to fairly decide consistent with due process the matters herein.

WHEREFORE, it is respectfully prayed that this Honorable Court forthwith schedule an evidentiary hearing on the petition of Carmine J. Persico, Jr., pursuant to 28 U.S.C. Section 2255 and, additionally, issue a writ of habeas corpus ad testificandum to the Warden of the United States Penitentiary at Marion, Illinois, to produce said Carmine J. Persico, Jr. at the Court for said hearings.

Marc A. Rosenberg

LAW OFFICES
NBERG, ROSENBERG
AND ROCKMAN

Sworn to before me, this
24th day of December, 1975.

Catherine J. Collado

A153

RECEIVED
U.S. ATTORNEY'S OFFICE
DEC 4 11 25 AM '75
EAST. DIST. N.Y.

EXHIBIT A

2255 Motion

RECEIVED
U. S. ATTORNEY
DEC 4 11 25 AM '75
EAST. DIST. N. Y.

EXHIBIT A

Memorandum

A154

Rosenberg, Rosenberg & Rockman

Attorneys and Counselors at Law

HARRY ROSENBERG (1915-1973)
GEORGE ROCKMAN
MARC A. ROSENBERG
MICHAEL M. PERLMAN
JOSEPH B. EHRLICH

Two Hundred Garden City Plaza
Garden City, New York 11530

516-248-4300

A155

September 9, 1975

James F. Haran, Chief
Michael J. Gillen, Parole Officer
United States Probation and Parole Office
225 Cadman Plaza East
Brooklyn, New York 11201

Re: HUGH McINTOSH
Employment

Gentlemen:

In reference to the in-person oral communication between the undersigned, Hugh McIntosh and Michael J. Gillen, parole officer, held at the office of the United States Probation and Parole office at approximately 11:00 A.M., September 8, 1975, it is understood as set forth below.

The law offices of Rosenberg, Rosenberg & Rockman located at 200 Garden City Plaza, Garden City, New York 11530, hereby offers employment to one, Hugh McIntosh, under the following terms and conditions:

1. Said employment will be on a permanent basis at said law offices located at the above-mentioned premises.
2. Mr. McIntosh will be expected to work a five day week commencing each and every Monday and ending each and every Friday.
3. The hours of employment of each work day will be from approximately 9:30 A.M. to approximately 4:30 P.M. with one hour for lunch and two coffee breaks of 15 minutes each, one in the forenoon and one in the afternoon.
4. The duties and responsibilities of Mr. McIntosh shall include legal research, preparation of outlines and details of legal briefs for attorneys in said law offices; pickup and delivery of legal papers to clients and/or prospective clients of said law firm and additionally other non-specific duties with the purpose of aiding and/or assisting the attorneys in said law firm.

EXHIBIT B

5. Under no condition shall Mr. McIntosh act or hold himself out to be an Attorney at Law nor shall Mr. McIntosh ever advise clients and/or prospective clients as to the law or do any act in any manner which would be consistent with the duties or responsibilities of a duly licensed attorney.

6. Mr. McIntosh will be compensated at a starting salary of $150.00 a week gross, less tax deductions, and will be paid on or about Friday of each week by check drawn on the regular account of Rosenberg, Rosenberg & Rockman.

7. It is understood and agreed that should Mr. McIntosh's performance become unacceptable that the firm of Rosenberg, Rosenberg & Rockman reserves the right to terminate said employment without condition but with due notice thereof within 72 hours to the United States Probation and Parole Office at 225 Cadman Plaza East, Brooklyn, New York 11201, Att: Michael J. Gillen, Parole Officer.

The employment offer herein is further conditioned on the receipt by the undersigned of a "Letter of Authorization" on the stationery of the United States Probation and Parole Office, stating the following:

1. The employment offer, its terms and conditions by Rosenberg, Rosenberg & Rockman to Hugh McIntosh, is acceptable as described above to the United States Probation and Parole Office

2. The United States Dept. of Probation and Parole have no objection to the employment of an ex-felony offender in a law office.

3. Any and all responsibilities, duties and/or obligations on the part of Rosenberg, Rosenberg & Rockman to the United States Department of Probation and Parole be set forth in said letter of authorization.

4. Any and all responsibilities, duties and/or obligations on the part of Hugh McIntosh to the United States Dept. of Probation and Parole concerning this job not already described in the within letter be outlined in the Letter of Authorization.

It should be noted that a copy of this employment offer and the Letter of Authorization will be mailed to the Supreme Court, State of New York, Appellate Division, Second Department. Should

BEST COPY AVAILABLE

for any reason the Appellate Divison condition said employment in any manner or not authorize such employment, then and in that event said employment offer shall terminate immediately and/or as the case be, said employment will be so qualified.

Very truly yours,

ROSENBERG, ROSENBERG & ROCKMAN

By: _____
MARC A. ROSENBERG

200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

C

A158

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
PROBATION OFFICE

JAMES F. HARAN
CHIEF PROBATION OFFICER

ROOM 304, U. S. COURT HOUSE
BROOKLYN 11201
212-875-6044

September 17, 1975

Rosenberg, Rosenberg and Rockman
Attorney's and Counselors At Law
Two Hundred Garden City Plaza
Garden City, New York 11530

RE: MC INTOSH, Hugh

Dear Sir:

We are in receipt of your communication dated September 9, 1975 wherein you set forth your intentions of offering employment to the above named parolee and outlining the nature of his duties and compensation.

Please be advised that we have no objections to the employment offer under the conditions agreed upon and provided the plan is approved by the Appellate Division.

Very truly yours,

JAMES F. HARAN
Chief U.S. Probation Officer

Michael J. Gillen

MICHAEL J. GILLEN
U. S. Probation Officer

MJG:dp

EXHIBIT C

A159

September 30, 1975

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

PERSONAL AND CONFIDENTIAL

Irving N. Selkin, Esq.
Clerk, Appellate Division,
Second Department
45 Monroe Place
Brooklyn, New York 11201

Dear Sir:

The undersigned, on behalf of the law firm of Rosenberg, Rosenberg & Rockman, seeks to employ one Hugh McIntosh, as a research assistant. Mr. McIntosh is a convicted felon who was released from the Federal penitentiary at Atlanta, Georgia, on September 5, 1975.

During the past year, the undersigned represented Mr. McIntosh in court actions in the United States District Court for the Southern District of New York; the United States District Court for the Northern District of Georgia, the United States Court of Appeals for the Fifth Circuit, and in applications to the Supreme Court of the United States. While I was engaged in these matters, it was discovered that Mr. McIntosh had a deep interest and knowledge of the law, through many years of independent self-study.

Upon his release from prison, Mr. McIntosh requested employment as a research assistant, and the undersigned made a personal visit to the United States Board of Parole, seeking permission to employ him. Enclosed herewith is photocopy of correspondence, dated September 9, 1975, formally requesting the United State Board of Parole's approval for said employment. In a letter, dated September 17, 1975(copy enclosed), the United States Board of Parole approved said employment, provided the plan, as detailed in the September 9, 1975 correspondence was approved by the Appellate Division.

EXHIBIT D

A160

Irving N. Selkin, Esq.
Clerk, Appellate Division,
Second Department

September 30, 1975

We hereby respectfully request the approval of the Appellate Division, Second Department. It would be greatly appreciated if a written answer to said request could be forthcoming as expeditiously as possible.

Thank you for your kind courtesies in this matter.

Respectfully yours,

ROSENBERG, ROSENBERG & ROCKMAN

By_____
MARC A. ROSENBERG

MAR:mi
Encs.

A161

Supreme Court of the State of New York
Appellate Division Second Department
Brooklyn, N.Y. 11201

FRANK A. GULOTTA
PRESIDING JUSTICE

October 9, 1975

Marc A. Rosenberg, Esq.
Rosenberg, Rosenberg & Rockman, Esqs.
200 Garden City Plaza
Garden City, New York 11530

Dear Mr. Rosenberg:

Your request for permission to employ Mr. Hugh McIntosh as research assistant was considered at Consultation on October 7, 1975 and the Court concluded that it would not render any advisory opinion, nor will it prematurely pass judgment on matters of this nature.

However, it is suggested that you may find Matter of Kahn, 32 A D 2d 360 helpful in determining for yourself your course of action in this matter.

Very truly yours,

Frank A. Gulotta

Frank A. Gulotta
Presiding Justice

FAG:s

EXHIBIT E

F

A162

Rosenberg, Rosenberg & Rockman
Attorneys and Counselors at Law

HARRY ROSENBERG (1915-1973)
GEORGE ROCKMAN
MARC A. ROSENBERG
MICHAEL M. PERLMAN
HOWARD A. SCHUMINSKY
JOSEPH B. EHRLICH

Two Hundred Garden City Plaza
Garden City, New York 11530

516-248-4300

October 30, 1975

Hon. Frank A. Gulotta
Presiding Justice
Supreme Court of the State of New York
Appellate Division
Second Department
45 Monroe Place
Brooklyn, NY 11201

Honorable Sir:

I have received your reply to my letter of September 30, 1975 and have examined the cited case Matter of Kahn.

While the instant situation appears to me to be totally unrelated to the fact pattern in Kahn, so that there will not be even the slightest appearance of impropriety, we have decided not to employ Mr. McIntosh in this office.

Thank you for your prompt response in this regard.

Respectfully yours,

ROSENBERG, ROSENBERG & ROCKMAN

Marc A. Rosenberg

MAR:sf
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
cc:James F. Haran, Chief
Michael J. Gillen, Parole Officer
U.S.Probation & Parole Office
225 Cadman Plaza East
Brooklyn, New York 11201

EXHIBIT F

prisoners sentenced under other statutes.

/76.

A163

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

CARMINE J. PERSICO : No. 75 C 2033
(60 CR 147)

- against - :

UNITED STATES OF AMERICA :

- - - - - - - - - - - - - - - - x

SUPPLEMENTAL MEMORANDUM OF LAW

BOZELL V. UNITED STATES IS OBSOLETE AS WELL AS INAPPLICABLE TO THE INSTANT SITUATION.

THE DISTRICT COURT OF THE UNITED STATES DOES HAVE THE AUTHORITY TO REVIEW ACTION BY THE UNITED STATES BOARD OF PAROLE.

Petitioner, Carmine J. Persico, does NOT request a review analgous to A.P.A. review but rather asks this Court to invoke its "continuing jurisdiction" pursuant to 18 U.S.C. 4208(a)(2) via 28 U.S.C. 2255 to ascertain whether its intentions at the time of "sentencing" as mandated by the Congress of the United States in its passage of 18 U.S.C. 4208(a)(2) have been carried out by the United States Board of Parole. Further, Persico does not ask this Court to "review" the actions of the United States Board of Parole

parole, and prior to the time the Board would do

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with respect to ordering the said United States Board of Parole to do or to refrain from doing anything - but rather requests this Honorable Court to note the actions of the United States Board of Parole in this matter in light of the Court's continuing shared responsibility with the Executive Branch of the Government in determining the length of incarceration of the defendant-prisoner incarcerated under authority of 18 U.S.C. 4208(a)(2). See United States v. Lewis, 392 F. 2d 440 (1968); Garafola v. Benson, C.A. 7, 11/8/74; Kortness v. United States, 514 F. 2d 167 (1975); United States of America v. Slutsky, C.A. 7, April 18, 1975.

Should this Court conclude that the Executive Branch of the Government as acting through the United States Board of Parole has not carried out the intention of the Court as demanded by 18 U.S.C. 4208(a)(2) (by the Court duly taking note of the Parole Board's decisions and actions), then it is respectfully prayed that this Court without the necessity of overruling the Parole Board, but as an act of its continuing shared responsibility in determining the length of incarceration of a defendant-prisoner, resentence said Carmine J. Persico, Jr. to a reduced term of incarceration consistent with the Court's intentions at

Carmine J. Persico, Jr. was indicted

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the time of sentencing. However, the United States District Court does have the power to review the United States Board of Parole.

In Bozell v. United States, 199 F. 2d 449, United States Court of Appeals, Fourth Circuit, October 8, 1952, plaintiff applied to the Court of Appeals, terming such application as an appeal from the Parole Board decision denying him parole. The petition was dismissed, the Court concluding....

> "There is no statute permitting an appeal from the Parole Board to this court, nor is the court given any authority to review action by the Board. No such power of review is granted by the Administrative Procedure Act, 5 U.S.C.A. §1001 et. seq. for the act expressly excepts from the right of review agency action which 'is by law committed to agency discretion. 5 U.S.C.A. §1009 Hiatt v. Compagna, 5 Cir., 178 F. 2d 42, 45....' The members of the court are without power to issue the unit (habeas corpus) since petitioner has not complied with the provisions of 28 U.S.C.A. §2255. Meyers v. Welch, 4 Cir. 179 F. 2d 707, 708."

Since Bozell, it clearly has been held that the United States District Courts do have the authority to review the actions of the United States Board of Parole. In Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971), Judge Marvin E. Frankel stated:

at which to enter judgments of conviction against

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"But it is urged that the Board's (United States Board of Parole) action is outside the court's power of review. It would be surprising and gravely questionable if Congress had meant to confer such final authority upon any administrative agency, particularly one that makes no pretense in learning in constitutional law.

"To be sure, the Parole Board is vested with broad discretion to set the terms and conditions on which a parolee may be released.... It is not the law, however, that such discretion embraces authority to decide final question of constitutional right. For Parole Board members and prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions....We do not denigrate their views, but we cannot be absolutely bound by them. Brown v. Peyton, 437 F. 2d 1228, 1232 (4th Cir., 1971)"

In King v. United States, 492 F. 2d 1337 (1974), it was held that the United States Board of Parole is an agency of the United States Government operating under procedures of the Administrative Procedure Act, 5 U.S.C.A. 551(1), 554(a), 18 U.S.C.A. 4201. Further, 5 U.S.C.A. 702 (Administrative Procedure Act) states:

"A person suffering legal wrong because of agency action within the meaning of a relevant statute[1] is entitled to judicial review thereof."

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1 Here, 18 U.S.C. 4203(a); 18 U.S.C. 4208(a)(2).

5 U.S.C. 704 "Action Receivable" (Administrative Procedure Act) states:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review...."

and,

5 U.S.C. 706 "Scope of Review" (Administrative Procedure Act):

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall
>
> (1) compel agency action unlawfully withheld or unreasonably delayed, and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. (See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419, 91 Sup. Ct. 814 (1971)."

In Masiello v. Norton, D.C. Conn. 1973, 364 F. Supp. 1133, it was held that although the United States Board of Parole does have broad discretionary power, such powers do have perimeters and, in the unusual circumstance when evidence is presented that it acted arbitrarily or in

violation of the regulations it promulated, a court may intervene and review the actions of the Board in the parole process. See also, United States ex rel. Buono v. Kenton, 287 F. 2d 534 (2d Cir. 1961); Sobell v. Reed, 327 F. Supp. 1294, Palmero v. Rockerfeller, 323 F. Supp. 478 (S.D.N.Y. 1971); United States ex rel. Hitchcock v. Kenton, 256 F. Supp. 296, D. Conn. 1916.

Ellen A Rosenberg

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

CARMINE J. PERSICO, JR. :

Plaintiff :

against : 75 C 2033

UNITED STATES OF AMERICA :

Defendant :

----------x

United States Courthouse
Brooklyn, New York

February 6, 1976
2:00 p.m.

B e f o r e:

HONORABLE JOHN ~~J.~~ DOOLING,

U. S. D. J.

I hereby certify that the foregoing is a true and accurate transcription of my stenographic notes in the above-entitled proceeding.

Official Court Reporter
U.S. District Court for the
Eastern District of N.Y.

SHELDON SILVERMAN
Official Court Reporter

Appearances:

ROSENBERG, ROSENBERG & ROCKMAN, Esqs.
Attorneys for Plaintiff
200 Garden City Plaza
Garden City, N.Y. 11530

By: MARC A. ROSENBERG, Esq.
of counsel

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: FRED BARLOW, Esq.
Special Attorney

THE CLERK: Civil motion, Carmine J. Persico versus the United States of America.

MR. ROSENBERG: Before I start, your Honor, I'm hoping that you're feeling better. I also have the flu. I know how it feels.

THE COURT: It would help me if you'd keep your voice up. That seems to have been part of my difficulty. My ears got clogged up.

MR. ROSENBERG: Thank you, your Honor.

Your Honor, I am here today representing Carmine J. Persico, Jr., presently incarcerated at the Federal Penitentiary, Marion, Illinois. Although Mr. Persico could not be present today, I would like the Court to note that in attendance here this afternoon are his wife Joyce, Mr. Persico's sons, Alphonse, Michael and Laurence, and his daughters, Barbara and Susan.

At this point I would like the record to indicate that the Government was duly served with the within 2255 motion and supporting memorandum on December 4, 1975, returnable December 15, 1975; that thereafter the Government orally requested a one-week extension of time in order to respond; that further, on December 22, 1975, the Government in writing requested a further delay, which was

opposed by counsel for Mr. Persico; that on December 24 your Honor granted the Government a delay up to and including January 20, 1976; that on January 21, 1976 your Honor granted the Government until 5:00 p.m. January 22, 1976 to respond; that the Government has yet to respond.

Carmine J. Persico, Jr. is now in service of a 14-year 18 U.S.C. 4208(a)(2) sentence. It is contended that the U.S. Department of Justice, acting through the U.S. Bureau of Prisons and the U.S. Board of Parole, has resentenced Carmine J. Persico, Jr. to a 14-year sentence without benefit of 18 U.S.C. 4208(2)(2).

We feel that the actions employed to accomplish this result by overt as well as covert methods have resulted in the United States Board of Parole denying to Mr. Persico the sentence he had received from this court, and as intended by this court by the powers given to it from the United States Congress.

We ask that the court today invoke its authority and correct this situation, not by overruling the United States Board of Parole or by directing the United States Board of Parole to do or not do anything, but rather, consistent with

its continuing jurisdiction under 18 U.S.C. 4208 (a)(2) and 28 U.S.C. 2255, by resentencing Mr. Persico to a length of incarceration as intended by the court when it first sentenced him and under 18 U.S.C. 4208(a)(2).

What is 18 U.S.C. 4209(a)(2)?

Fixing eligibility for parole at time of sentence.

Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year,

The Court may fix the maximum sentence of imprisonment to be served, in which event the Court may specify that the prisoner may become eligible for parole at such time as the Board of Parole may determine.

The sentencing Court's role in the issuance of a sentence under 18 U.S.C. 4208(a)(2) is unlike all other sentences because it permits the Court at all times during the period of incarceration of defendant to share with the Executive Branch the responsibility of determining

how long a prisoner should actually serve.

In United States v. Lewis, which I have included in a supplemental memorandum this afternoon, your Honor, 392 F.2d 440 (1968), the United States Court of Appeals for the Fourth Circuit stated: "The Senate Report explained that the portion of the bill later codified as 4208(a)(2) was designed to permit the Court, at its discretion, to share with the Executive Branch the responsibility for determining how long a prisoner should actually serve. Only if there is a discretion in setting the sentence can the Court share responsibility with the Executive; otherwise the length of the term would be prescribed exclusively by the United States Board of Parole."

Had Congress intended otherwise, it would have said so explicitly, as it did in the companion section, 4208(b), which does exact the maximum the Court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence prescribed by law.

Representative Emanuel Celler, chief author of 18 U.S.C. 4208(a)(2), proposed said (a)(2) legislation envisioning this continued

an institutional review hearing in open court.

shared responsibility by the court with the Board of Parole, rather than leaving the time actually served under a sentence wholly to the Board of Parole. Representative Celler stated: "The second bill, House Joint Resolution 425, would authorize the sentencing judge to fix the maximum release date and also the time when a prisoner would become eligible for parole, provided the minimum date does not exceed one-third of the maximum. The present statute, at that time was 4208 of Title 18 of the United States Code, which provides that a prisoner may not be eligible for parole until he has served one-third of the sentence imposed."

Representative Celler went on to say, "This is a purely arbitrary limitation and does not take into consideration the varying responses individual persons make to the rehabilitation programs carried on in our federal penal and correctional institutions." I think that is very important, that the rehabilitation would be indicated by the prisoner's response at the federal institution.

It frequently happens that a prisoner is ready for release before the statutory minimum for

for eligibility is reached. The sentencing judge has the benefit of the presentence report, is familiar with local conditions and any aggravating and mitigating circumstances involved.

In cases where he, the sentencing judge, believes the defendant might respond quickly to the "rehabilitation" program, the proposed bill would give the authority to fix an earlier eligibility date for release.

The intention of the statute 4208(a)(2) is clear, your Honor: The sentencing judge has the authority to share responsibility with the executive branch of the government for the length of incarceration of the defendant-prisoner based upon the judge's discretion in believing the defendant-prisoner might respond quickly and positively to the rehabilitation program at the penal institution.

Further, the judge who gives such a sentence based on the benefit of his knowledge using the presentence report, his familiarity with local conditions, and his understanding of any aggravating and/or mitigating circumstances involved.

The role of the United States Board of Parole in 18 U.S.C. 4208(a)(2) sentences is different than when it determines parole for

prisoners sentenced under other statutes.

Under 18 U.S.C. 4208(a)(2) sentences the Parole Board shares the responsibility with the sentencing judge and must carry out the sentence of the court within the spirit of 18 U.S.C. 4208 (a)(2).

The Parole Board, according to the statute, must base its decision as measured by the defendant-prisoner's response to the rehabilitation programs at the prison.

The United States Parole Board must give serious consideration, meaningful consideration, to (a)(2) prisoner-defendants based on rehabilitation.

In Garafola v. Benson, 7th Circuit (1974), the Court stated:

"We conclude that 4208(a)(2) was enacted, and has been interpreted by sentencing judges since its enactment, to give the court sentencing an adult offender the authority to make him eligible for release at any time in the Board's judgment is appropriate in light of the factors that include his institutional performance and progress."

Therefore, that provision, read in the context of the statutory scheme, imposes a duty on the Board to give meaningful consideration to

parole, and prior to the time the Board would do so if the prisoner had been sentenced under Section 4202.

The Board breaches this duty when by its own admission it ordinarily fails to give serious consideration to an (a)(2) prisoner's parole application at the initial hearing and in more than three-fourths of the (a)(2) cases never again considers the application or does not consider it until substantially more than one-third of the sentence has been served.

In the fifth matter, Garafola -- at least five matters -- the Board entered an order after the initial hearing continuing the case until a date well beyond the one-third point in the sentence, which is the same case here, your Honor, thus deciding, in effect, that it would not give serious consideration to this (a)(2) prisoner's application until well after the time it would have done so if he had been sentenced under Section 4202. The Court stated the situation created by the Board's orders is not merely ironical, it is illegal.

Let's examine the case at hand, Carmine J. Persico, Jr. and his 4208(a)(2) sentence.

Carmine J. Persico, Jr. was indicted originally in the year 1959. In April of 1960 a superseding indictment, 60-CR-147, was handed down by a federal grand jury charging Carmine J. Persico, Jr. along with others of violation of 18 U.S.C. 1951, obstructing commerce by robbery and conspiracy.

Five trials followed, and the period of the first indictment until incarceration in 1972 covered almost thirteen years. We believe your Honor considered this as one mitigating circumstance in giving Mr. Persico an (a)(2) sentence.

Persico was sentenced by your Honcr on June 6, 1969, to a maximum of fourteen years pursuant to and under authority of 18 U.S.C. 4208(a)(2),

At the conclusion of the fifth trial your Honor issued a memorandum stating that "The history of the present case through the day of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberations in seeking retrial... It is held here that the aggregate here has reached a point

at which to enter judgments of conviction against the defendants would be to deny them due process."

Later, your Honor did sentence the defendant pursuant to the order of the 2nd Circuit, but did sentence Mr. Persico under 18 U.S.C. 4208 (a)(2). We believe that was a mitigating circumstance.

On January 27, 1972, more than four years ago, Carmine J. Persico, Jr. commenced service of his sentence.

On February 7th the United States Attorney issued a report on Mr. Persico, which is now contained in his parole file.

Only ninety days into service of his (a)(2) sentence, the Justice Department of the United States, on or about April 28, 1972, by Assistant Attorney General Peterson, by secret memorandum, issued a letter intended for Mr. Persico's parole file, which found its way to Mr. Persico's parole file, with a recommendation as to the parole probabilities of Carmine J. Persico, Jr.

The contents of that correspondence have never been revealed, although duly demanded, but upon information and belief contain recommendation for no parole at all, notwithstanding any (a)(2) sentence as issued by this honorable Court.

Although for the intended purpose of rehabilitation, the United States Board of Parole tries to keep a prisoner with close proximity of his wife, children and parents,

On or about April 14, 1972, without notice, reason or hearing, Carmine J. Persico, Jr. was removed from the Federal Penitentiary at Atlanta and taken to the maximum federal prison facility at Marion, Illinois.

One of the results of this move was that instead of Carmine J. Persico, Jr. meeting the Parole Board some two to three months subsequent to incarceration, as he was supposed to under an (a)(2) sentence, it was some five months, and not until June of 1972, when the Parole Board and Carmine J. Persico, Jr. first met.

Thereafter, on or about the 3rd day of July, 1972, at an in-chamber conference, your Honor, James Drucker, Assistant United States Attorney, Mr. and Mrs. Carmine J. Persico, Sr., and Carmine J. Persico, Jr. met, and your Honor stated that it is what is called an (a)(2) sentence, "I am sure I would never give a sentence that long if it wasn't."

On October 12, 1972, the United States

Attorney issued a memo re Persico to the Warden, which is now contained in his parole file.

In October of 1972 the United States Board of Parole finally made a decision based on the June meeting continuing Mr. Persico without parole for an institutional review hearing in April of 1975.

On or about the 19th day of November 1973, some four and one-half years after receipt by Mr. Persico of his sentence in this court--

THE COURT: That was not that long after he surrendered, was it?

MR. ROSENBERG: This is something the United States Board of Parole did.

On or about the 19th day of November, 1973, your Honor, some four and one-half years after receipt by Mr. Persico of his sentence -- he was sentenced in July of 1969, I believe -- and some two years after commencement of his sentence and some fifteen years after Congress passed 18 U.S.C. 4208(a)(2), the Justice Department of the United States and the United States Board of Parole published for the first time in the Code of Federal Regulations, "Paroling Guidelines." Significantly, these guidelines made no mention of the special status Congress had attached to (a)(2) sentences,

nor did the United States Board of Parole distinguish any (a)(2) sentence from other types of sentences.

Pursuant to Section 2.20 of 28 Code of Federal Regulations entitled "Paroling Policy Guidelines," each applicant for parole is given a salient factor score to serve as an aid in determining parole prognosis. These guidelines indicate the customary range of time to be served before release for various combinations of offense and offender characteristics. No mention of 18 U.S.C. 4208(a)(2) is contained in Grasso v. Norton, where the Court made a specific finding that the guidelines are applied in between 92 to 94 percent of all cases.

Hence, for argument's sake, your Honor, if a man's salient factor score and parole prognosis score indicate a customary range of incarceration of seven years, and that same man was issued a seven-year sentence under (a)(2), that man has a 92 to 94 percent probability of doing seven years notwithstanding a 4208(a)(2) sentence.

To make matters even more ridiculous re (a)(2) sentences, the United States Board of Parole, to clarify what they meant, said on September 5,

1975 in their newly published regulations that, "First, by its choice of criteria, the Board has made clear that it has de-emphasized rehabilitative factors as a condition of release."

This position is 180 degrees opposite to the position stated by Congress in its passage of 18 U.S.C. 4208(a)(2), and, of course, we believe to the intention of the Court's sentence.

With these intervening events in mind, Carmine J. Persico, Jr. continued his incarceration in Marion awaiting his April 1975 Institutional Review Hearing with the Board.

In the normal course of events, Mr. Persico's case worker prepared a progress report to be used at the April 1975 meeting.

That special progress report stated in part:

"Persico is a 41-year-old offender who is serving a 14-year sentence for theft from interstate shipment. He has served 38 months of this confinement. Although he has spent a good deal of time out on writ, his overall adjustment has been considered as good. Since his incarceration, he has maintained a clear conduct record, has received favorable work and housing reports and has recently become active in self-improvement programming.

In Marion, he was initially assigned to the athletic detail, where he performed general maintenance duties . He was assigned to the radio room on May 30, 1974, where he currently remains. His work reports have always been of a satisfactory nature, and he is considered to respond to supervision in a favorable manner. In his unit, his personal and quarters sanitation habits have been rated as good. He is considered to be a quiet resident, who does not present problems to his work or housing unit supervisors. In self improvement activities he has received his GED award, high school equivalency.

Persico is a model prisoner, your Honor.

He has responded quickly and positively to rehabilitation.

He is under an 18 U.S.C. 4208(a)(2) sentence.

With this report in mind, the recommendation of the Parole Board was "no parole." Their recommendation was that in view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted.

On April 3, 1975, Mr. Persico met the Parole Board. He demanded to know what recommendations were confined in his parole file by the Justice

Department, as, for example, the Assistant Attorney General's letter and recommendations. This was denied to him.

He submitted that he was eligible for parole and should be granted parole based on his performance under the (a)(2) sentence. This was denied.

He submitted that he would be willing to be paroled outside of the State of New York, to either the State of Connecticut or the State of Florida, where he had offers of employment. This we believe wasn't even considered.

The decision at that April 3 meeting was to not decide Mr. Persico's case at all, but, going along with the recommendation of the Classification Committee, the Board decided on April 14, 1975 to designate Carmine J. Persico, Jr. as an "original jurisdiction" matter, so that the Regional Directors of the United States Board of Parole in Washington would decide his application. No reasons, hearing, et cetera, were given to Mr. Persico for such designation.

In Rothman v. Director, United States Board of Parole, U.S.D.C., N.D.Ga, August 20, 1975, Judge Hill stated, "By respondent's (United States Board of Parole) own admission, the very

purpose of the system, original jurisdiction, is to increase the voting quorum requirement for these cases, to enable the Board to more confidently deny parole to a prisoner who is a popular public figure."

Significantly, prior to Mr. Persico being classified as "original jurisdiction" by the United States Board of Parole, Bureau of Prisons, the Justice Department classified him as a special offender, also without notice, hearing, et cetera.

In Stassi v. Hogan, Chief Judge Edenfield of the United States District Court of the Northern District of Georgia stated: "It has been recognized that the treatment inherent in the special offender process constitutes grievous loss within the meaning of Morrissey v. Brewer."

Judge Edenfield in Stassi quoted Judge Zampano of the United States District Court for the District of Connecticut in Catalano v. United States, where it was held that although the special offender classification may facilitate prison administration, this does not excuse the lack of due process inherent in the present practices by which an inmate is accorded special designation.

This Court agreed and therefore held that since there appears to be a profound and adverse

change in the prisoner's status both with regard to the conditions of his confinement and with regard to his chances for parole as a result of his being designated a special offender, that prisoner would be entitled to the basic elements of rudimentary due process before he may be so designated.

"A prisoner should be informed of the basis of such designation and be afforded sufficient information to marshal the facts in his defense and to controvert the charges at a hearing.

"The prisoner should be given full opportunity to present his side of the case, to present documentary evidence and to call witnesses in his behalf." Mr. Persico, although denied all these rights, was given nothing.

Again in Rothman Judge Hill states: "This Court is of the opinion that the Stassi and Catalano reasoning applies even more forcefully in the concept of an original jurisdiction case," i.e., parole consideration.

So having gained Persico's parole application as original jurisdiction, the National Appellate Board of the United States Board of Parole on April 28, 1975, rendered a decision. Their decision was to continue no parole for

an institutional review hearing in April 1978, and their reasons were as follows, your Honor: They stated that "Your offense behavior has been rated as Very High Severity. You have a salient factor score of 5."

THE COURT: Salient factor score of 5?

MR. ROSENBERG: This was the original decision, your Honor. Before it was just on appeal.

"You have been in custody a total of 38 months." This, of course, was in April of 1975, when this decision that I'm reading was made. "Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you will live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by this policy.

"Your offense was part of a large scale or organized criminal conspiracy. An unusually sophisticated or professional manner was evidenced in the planning or commission of the offense. It is believed that you are a poorer risk than is indicated by the Salient Factor Score."

Appeal was filed and argued on October 8, 1975, before all the Regional Directors of the United States Board of Parole.

On October 15th that Board rendered its decision affirming the April 28, 1975 decision in total and witn the exception that an adjustment in the Salient Factor Score was made upwards to 7, which changed--

THE COURT: They changed the Salient Factor Rate?

MR. ROSENBERG: Yes.

THE COURT: From 5 to--

MR. ROSENBERG: Which was not adverse to Mr. Persico, because that change in score, your Honor, put Mr. Persico in a range of indicated and proposed incarceration according to the Board's own guidelines, from 35 to 45 months.

THE COURT: Rather than the other range?

MR. ROSENBERG: Rather than from 35 to 55

The United States Board of Parole has

months. It put Mr. Persico, your Honor, squarely over the limit of the incarceration, without considering the (a)(2) sentence.

At this point, your Honor, Mr. Persico has been incarcerated 48 months.

THE COURT: Today.

MR. ROSENBERG: Today, which is squarely months over the limit.

The United States Parole Board, your Honor, issued its decision in spite of the fact that Carmine J. Persico, Jr. received an (a)(2) sentence, in spite of the fact that under (a)(2) sentences all criteria for rehabilitation had been met, they reached a decision with the intended goal of de-emphasizing rehabilitation as stated in their guidelines;

They reached this decision with letters from the Justice Department and former Attorney General Peterson's letter as to parole probabilities, in spite of the sentence of this Court;

They reached this conclusion after first considering him as a special offender by the Bureau of Prisons;

They reached this decision after designating him without due process as original jurisdiction, so

they could feel more confident in turning down his parole application;

They reached this decision after issuing regulations as Paroling Policy Guidelines, which ignore rehabilitation, which make no mention of (a)(2) sentences, such legislation which ignores parole probability before one-third of sentence, and such rules being issued 15 years after Congress passed 18 U.S.C. 4208(a)(2), four years after this Court issued its sentence, and two years after Persico commenced service of his sentence.

This decision indicates not even an attempt to share responsibility of the length of sentence with the sentencing court under 4208(a)(2).

We contend that that decision as a matter of fact resentences Carmine J. Persico, Jr. to a 14-year straight sentence, ignores the sentencing judge, your Honor, ignores the Congress and the United States District Court.

An examination of the decision of the en banc Regional Directors is most revealing. They state as their Reason No. 1, "Your offense behavior has been rated as very high severity."

We answer that this is not a reason, but this is a quote of the Board of Parole guidelines,

issued four years after your Honor passed sentence based on the (a)(2) statute. These guidelines also de-emphasize rehabilitation. Further, your Honor, when sentencing Mr. Persico under (a)(2), was very much aware of his offense. Because an offense is classified as "very high severity" now by the Board of Parole does not establish a reason for not granting parole or not following an (a)(2) sentence and making defendant eligible for parole based on rehabilitation before serving one-third.

The next reason: you have a Salient Factor Score of 7. Well, your Honor, as I indicated before, this Salient Factor Score puts Mr. Persico over the guidelines. He's now served more time, and at the time of that decision served more time than indicated by the Board's own guidelines and, as stated by the court in Connecticut, 92 to 94 percent of the cases are decided within the guidelines, and that's not even considering an (a)(2) sentence.

The next reason was, "You have been in custody a total of 45 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 35 to 45 months to be served before release, with good institutional

performance and adjustment."

We submit there is no question as to Persico's good institutional performance and adjustment, and the Board then is just merely restating its own published guidelines, which close examination reveals that he is over; he is now over those guidelines and was over at the time of that decision.

The next reason was, "After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted."

We submit, your Honor, all relevant factors and information presented included types of information not applicable to Carmine J. Persico's sentence: unfounded conclusions and directions issued by the Justice Department making no consideration as to (a)(2) sentences; secret information, as issued by Assistant Attorney General Peterson; original jurisdiction status without due process; special offender status without due process; rehabilitation was not even considered; (a)(2) sentence was not considered. Only the guidelines which are considered, promulgated four years after this Court issued sentence.

The next reason was there is not a reasonable probability that you will live and remain at liberty without violating the law because of your long criminal history.

First of all, Mr. Persico's long criminal history consists of two misdemeanor convictions, your Honor. That was one of the points that made the Salient Factor Score go up two points. They had "a long criminal history," and only two misdemeanor convictions.

THE COURT: I think they are thinking of his arrest record, not his convictions.

MR. ROSENBERG: I understand what they were thinking of.

Mr. Persico submitted that he had worked in Florida and/or Connecticut away from New York in his previous encounter with the law.

We contend, your Honor, that your Honor examined this long criminal history and was just as aware of convictions and/or arrests with the presentence report before your Honor and after your Honor presided over a six-weeks trial, as the Board of Parole was familiar with it.

The next reason was Board policy limits a continuance for not more than 36 months without

review. Then they stated, "Your continuance has been limited by this policy." Your Honor, this in itself is a violation of the (a)(2) sentence.

THE COURT: Is that the decision in April or the intermediate or final decision?

MR. ROSENBERG: Both. This was the decision in April and after the Salient Factor Score went up two points. Mr. Persico was over the guidelines. They still gave us the same decision.

THE COURT: They repeated that statement.

MR. ROSENBERG: Repeated it and affirmed it. "Your continuance has been limited by this policy." In Garafolo it was held a continuance of that length under (a)(2) sentence was not merely ironical -- excuse me, was illegal, because it would afford no parole consideration whatsoever, your Honor, for three years. Under (a)(2) sentence, unquestioned, unchallenged, good rehabilitation.

The next reason, your Honor, was, "Your offense was part of a large scale or organized conspiracy or an ongoing criminal enterprise."

Mr. Persico's position as to this was, No. 1, this is not a reason, but a conclusion, but, if true, this was also considered by the Court

after presentance report, at the time of sentence.

At the in-chamber conference held July 3rd, 1972, you stated, on page 21, that the theory of the case expressed in the evidence at the trial was that he, Carmine J. Persico, Jr., was the head man, that he was the key to the whole thing.

Well, your Honor, we believe that you were well aware of this reason and, of course, still considered it and gave Mr. Persico an (a)(2) sentence so the Board of Parole's reasoning here is not a new reason and is something that your Honor considered and is not a reason for the Board of Parole to ignore this Court's sentence.

Your Honor went on to further state that, "I would have to say that it was an organized offense. It was an organized thing where men had job assignments."

The next reason was, "An unusually sophisticated and professional manner was evident in the planning and commission of the offense." Your Honor, again, the same thing. Your Honor was well aware of the entire transaction, having presided over a 6-weeks trial.

Congress in its passage of 18 U.S.C. 4208 (a)(2) meant for the United States District Court,

unlike under other sentencing statutes, to have continuing jurisdiction with the Board of Parole, concurrent if necessary, for determining how long a prisoner should actually serve.

In U.S. v. Lewis -- your Honor, I gave you a copy before -- it was held that if the sentencing court concluded that its intentions have not been complied with by the Board of Parole, then without the necessity of ordering the Board of Parole to do anything, may invoke the sentencing court's continuing jurisdiction and resentence defendant-prisoner to a term of imprisonment according to the sentencing court's intentions.

We submit, your Honor, in the matter of Carmine J. Persico, Jr. we submit that the United States Board of Parole has not given any meaningful parole consideraton or any parole consideration at all, for that matter, nor does it intend to, especially it does not intend to under the (a)(2) statutebased on rehabilitation.

The Court's intention, of course, has been-- The Parole Board's intention has been stated well: "Your continuance has been limited by the policy of no continuance over 36 months."

In Kortness v. U.S., the 8th Circuit met

with a similar problem to that presented here. Plaintiff was serving a 3-year sentence pursuant to 18 U.S.C. 4208(a)(2). He began serving his sentence on or about November 29, 1973. He then applied for parole on January 25, 1974, and was given a hearing in March 1974. Following that hearing the Parole Board, on April 15, 1974, issued an order denying Kortness parole and determining that he would receive no further consideration for parole during his prison term.

Kortness then brought--

THE COURT: They put him over to maximum release date.

MR. ROSENBERG: He only had a 3-year sentence. The Board policies in Mr. Persico's case limit that continuance to 36 months. They state so specifically.

THE COURT: I understand.

MR. ROSENBERG: Kortness then brought an action pursuant to 28 U.S.C. 2255 claiming he had pleaded guilty to a crime and in return received a sentence under 18 U.S.C. 4208 (a)(2), not knowing that under the Parole Board guidelines he would in effect be a non-parolee. Kortness contended that because of these guidelines -- the guidelines

published the same day Kortness was sentenced, without the knowledge of either Kortness or the sentencing court -- he is compelled to serve more time in prison than contemplated by the sentencing court.

Your Honor will recall Mr. Persico's sentence was issued four years before the issuance of these guidelines.

In May of 1974 the district court denied Kortness's 2255 petition, stating that the Court is without authority to direct the Board in the discharge of its responsibility and is without authority to modify the sentence imposed.

THE COURT: Is without authority?

MR. ROSENBERG: To modify the sentence. The Court of Appeals for the 8th Circuit reversed and remanded for resentencing, holding that a sentencing court does have "continuing authority and jurisdiction" at any time during the period of sentence imposed to modify and/or reduce the sentence imposed, if the Court concluded that its intentions have not been complied with by the Parole Board.

Judge Bright, in writing a decision in Kortness, stated: "We agree that the guidelines

serve to predict with reasonable accuracy the actual time that would be served by a federal prisoner under a 4208(a)(2) sentence." Of course, not in this case, in Persico's case, because he's already over those guidelines. "However, in this case, the publication of these guidelines was made at the same day as the sentencing. Without access to these guidelines, the sentencing judge was entitled to assume that defendant Kortness would receive meaningful parole consideration for parole at an early date or at least upon completion of one-third of his sentence."

He went on to further state that "The 7th Circuit recently observed the judge who sentences a prisoner under 4208(a)(2) ordinarily contemplates that at an appropriate time before his one-third point in the sentence, the Parole Board will exercise a meaningful judgment upon, i.e., give serious considerations to, the question of whether the prisoner should be paroled before the one-third point."

Kortness was resentenced, your Honor.

In a recent similar case, U.S. v. Praasch, a copy of which I also submitted this morning, the United States District Court in the Northern

District of Illinois, Eastern Division, Judge McGann, in reducing thirteen defendants' terms of incarceration, stated in part: "Between the imposition of sentences in this case in 1973 and the commencement of service of those sentences in 1975, the Parole Board adopted a policy introducing a most significant new factor into the determination of parole eligibility."

The Judge, in turn, took the matter up in correspondence with the chairman of the Board of Parole. The Board expressed an unwillingness to depart from its guideline program and suggested that the Court had available to it a reduction of sentence as a solution.

"The problem here lies in the unique set of facts before this Court in this case. Those facts reveal the unusual circumstance of defendants recently commencing service of a sentence which, because of circumstances intervening between imposition of sentence and commencement of sentence, can be expected to be very substantially longer than the sentencing court considered.

Motions to reduce thirteen defendants' sentences were granted.

On April 18, 1975, the Second Circuit in

U.S.A. v. Slutsky recently ruled on a timely Rule motion for resentencing, upon the grounds of mistake of fact in sentencing, as relating to the United States Board of Parole's administration of 18 U.S.C. 4208(a)(2).

In that case the Slutskys were tried by jury in the United States District Court for the Fifth District of New York and convicted of an attempted income tax evasion and filing false partnership tax returns.

The Slutskys filed a timely Rule 35 motion for reduction of sentence before Judge MacMahon, and without a hearing were denied relief.

Their contention was that the judge who sentenced them did so under a mistake of fact as relates to the United States Board of Parole's administration of 18 U.S.C. 4208(a)(2), the provision under which they were sentenced.

The Slutskys argued that the District Court must have employed an (a)(2) sentence with the expectation that the Board of Parole would consider them for early release taking into account their prison performance and other relevant factors. They concluded, however that the Board of Parole had ignored the possibilities for early release

which 4208(a)(2) provides.

In a well-reasoned opinion, Judge Moore stated: "We are convinced that the parole consideration for the Slutskys is likely to depart substantially from what we assume were the reasonable expectations of the District Judge. Accordingly, we think a remand for resentencing is appropriate in order to allow the District Judge an opportunity to reconsider the original sentence in light of these new circumstances. We refer particularly to the Board of Parole's recently issued parole decision making guidelines, 28 C.F.R. 2.20 (1974), and related regulations."

The same problem here, your Honor.

The Court went on to further state: "Although the guidelines were available at the time of the appellant's Rule 35 motion, they were not cited in support of it, nor has the use of the guidelines for (a)(2) prisoners been well publicized, at least among judges in this circuit, who remained largely ignorant of the practice until well after the denial of the instant motion on July 24, 1974."

That is five years subsequent to your Honor's sentence.

The United States Board of Parole has unequivocally and boldly put forth its position regarding Carmine J. Persico, Jr.: No parole consideration at all until April 1978, and then the only reason the Parole Board will even consider making an attempt at appearing to meaningfully consider him for parole is because their Parole Board policy limits a continuance to no more than 36 months. As so aptly stated by the Parole Board on October 15, 1975 and previously, "Your continuance has been limited by this policy."

In April of 1978 Carmine J. Persico, Jr., while having a salient factor score of 7, calling for a 35 to 45 month incarceration, will have been incarcerated for some 75 months--

THE COURT: Seventy.

MR. ROSENBERG: Seventy-five months, with continued good institutional performance and adjustment.

The decision of the United States Parole Board, your Honor, not to consider Mr. Persico at all for parole, coupled with the sentence of the United States District Court under 18 U.S.C. 4208(a)(2) could not have been the intent of the sentencing court in July 1969, four years before

these guidelines.

Your Honor, at the July 3, 1972 hearing in your chambers you stated, "He would be the last one in the world to think he has to get further education or training," meaning Mr. Persico. As noted before, Mr. Persico has commenced and completed his high school equivalency training and received his G.E.D. award. This, your Honor, is indicative of his positive response to rehabilitation.

Additionally, your Honor, I would like the Court to note two awards received by Mr. Persico at Marion, one the Distinguished Service Award presented by the United States Jay Cees, the other award, your Honor, in the William H. Spalding Historical Society, awarded to Mr. Carmine J. Persico, Jr. for outstanding participation in the activities, considering his story, et cetera.

Your Honor, you stated at that hearing in July of 1972, "It is what is called an (a)(2) sentence. I am sure I would never have given a sentence that long if it wasn't."

Your Honor, it wasn't. You intended an (a)(2) sentence, but Mr. Persico never, in fact, received an (a)(2) sentence. Your Honor, we are here today because of that fact.

We ask this Court to search its conscience and to grant to Mr. Persico and indirectly to his wife, five children and aged parents, the relief which they have so justly earned. Thank you.

THE COURT: Do you know what Mr. Persico's mandatory release date is?

MR. ROSENBERG: 1980, sometime in 1980, I believe, your Honor.

THE COURT: Eight oh.

MR. ROSENBERG: Yes.

THE COURT: So that the date which he has been set over to is within a couple of years of mandatory release.

MR. ROSENBERG: Three years from April--

THE COURT: No, but he has been set over, you said, to a date in '78.

MR. ROSENBERG: April of 1978.

THE COURT: That is within about two years of his mandatory release date.

MR. BARLOW: I can supply that. The Bureau of Prisons document, one of the exhibits of Mr. Rosenberg's motion, sets the tentative release date, and that assumes all the good time that could have accrued to Mr. Persico on October 20th, 1980.

THE COURT: That is on the assumption of

earning good time without any industrial time.

MR. ROSENBERG: Without jail time he has credited, without certain programs. I believe in my discussion with Mr. Persico he said sometime around 1979, most likely, all his credits.

THE COURT: Industrial good time, credits over and above straight good time allowance.

MR. ROSENBERG: In other words, that he would most likely be released in 1979, about a year after this continuation.

THE COURT: Your point is, as a practical matter, they've continued as nearly as they can to mandatory release date.

MR. ROSENBERG: They said so, continuance limited by that policy.

THE COURT: Your point is that they have come as close to putting him over to mandatory release date as the law allows.

MR. ROSENBERG: That's correct.

THE COURT: I understand your argument.

MR. ROSENBERG: Your Honor, one of Mr. Persico's co-defendants did do all his time up to and including his mandatory release date, also had an (a)(2) sentence by this Court and also was not considered for parole and then was granted parole

and a few days before his parole was to come into effect, it was rescinded without reason.

THE COURT: You'd better not get into that. McIntosh's case was a great deal more complicated than that, Mr. Rosenberg, a good of confusion whether he wasn't being allowed on that first release date, as suggested, to a double credit-- Never mind. That's beside the point.

MR. ROSENBERG: Your Honor, in summary, we believe that Carmine J. Persico, Jr. is now in the service of an illegal sentence, not the sentence of this Court. We ask this Court rectify that situation by resentencing him to a reduced term.

THE COURT: I'm afraid I'll have to interrupt here because I must make a telephone call to another court. I hope it won't take more than five or ten minutes, and I'll be back.

(Recess)

MR. BARLOW: Mr. Rosenberg's supplemental memorandum of law has taken quite a bit of the wind out of the sails of my argument, but I think it's going to be something that helps both my argument and the Court's reasoning processes that it will have to come to for decision.

In the motion, as a very good advocate,

Mr. Rosenberg has carefully refrained from any direct attack on the Board of Parole as to their guidelines or as to the reasons that they have advanced in the various hearings concerning Mr. Persico. Instead of a direct attack upon their actions, I should note obviously they weren't joined as defendants in this case, instead of that, he has tied both points of his argument, the first point being that the actions of the Board of Parole concerning Mr. Persico don't comport with this Court's intention at the time of sentencing and second, that the reasoning or the reasons that the Board of Parole has given in its various hearings concerning Mr. Persico also don't comport with this Court's intention at the time of sentencing.

I think that narrows the scope of the factors which the Court must consider in determining this motion because, I think, by carefully pinpointing and eliminating the thrust of his argument, that his argument has precluded any argument or any decision that has to be based upon due process.

I don't think here that the Court has to be concerned with a decision reviewing the Board of Parole as an aegis under the Administrative Procedures Act or in determining whether or not

the various functions and the various reasons given during the hearings at the Board of Parole comport with due process because of the very limited and very pointed way in which the argument has been made.

I think it's appropriate to go back over the chronology a little bit, of what has happened with Mr. Persico's case and flesh it out a little bit to see what we can glean from the record as to what the Court's intention was at the time of sentencing.

First, although the Court declined to sentence Mr. Persico and his co-defendants before it went up to the Court of Appeals, I think it's much more probable than not that this is not any consideration that had to do with the relative merits of the defense, since as late as a couple of weeks ago the Court in the Williams case, that I tried, made clear its position on retrials of criminal cases. I think we can put that aside as a factor in the ultimate sentencing of Mr. Persico.

When Mr. Persico was sentenced, we can glean some facts from the record. First of all, he was given by far the greatest sentence. He got fourteen years. Mr. McIntosh got nine years, but the Court

was under the misapprehension that the nine years would be credited, or that 922 days would be credited on the nine-year sentence and back in December '73 reduced that to six years.

Mr. Spiro, Mr. Albanese, because of their long-time incarceration during the various trials--

THE COURT: Spent more time in jail than out after the Persico trial.

MR. BARLOW: We know that at least at the time of sentencing that Mr. Persico was given what I would suggest is at least eight years more sentence than any other of the defendants in this case, since the Court eventually corrected Mr. McIntosh's sentence because of the misapprehension over the 922 days.

THE COURT: McIntosh had time and the reduction in his sentence was in an effort to try to work out the time that he was entitled to in one or another way. Frankly, he had some "wasted" time because he served a good number of years in state prison under sentence which was later set aside and was never followed up, reinstated in any way. That time was served, I believe, after 1969, after the offense with which the so-called Persico case was of concern.

I think the only time that Mr. Persico had available at sentence date or surrender date was that he had been remanded during trial, one or another -- perhaps two of the trials -- I don't know.

MR. BARLOW: That would be at least the five months during the trial that Judge Rosling had.

THE COURT: I believe he had no other time in prison and -- well, as you know, he was not remanded during the trial.

MR. BARLOW: Also, the memorandum makes great light that with all of the presentence data that the Court had available to it at the time of sentencing, it gave Mr. Persico an (a)(2) sentence.

I would suggest that contrary to that, the Court had all the available data and gave Mr. Persico a fourteen-year sentence.

THE COURT: The maximum under Section 1951--

MR. BARLOW: Is twenty years.

THE COURT: Twenty years.

MR. BARLOW: I would also suggest, your Honor, that the Court had available all of the information from the time of sentencing--

THE COURT: Let me ask--

MR. BARLOW: Excuse me, sir?

THE COURT: I don't know whether you noticed,

Mr. Rosenberg, but I do not recall that any of the guidelines, even in the extreme right-hand column, goes so high as to -- what you might call exhaust maximum sentences under the greatest crimes.

MR. BARLOW: They do.

THE COURT: For example, 2113(d), where the maximum, I think, is twenty-five years or thereabouts, I don't think the right-hand column guidelines for armed bank robbery would get you within hairline distance of twenty-five years, which is the Congressional maximum, and I think as you apparently know, from your reading, 15-year sentences for armed robbery are very common indeed.

We have to use the guidelines with a great deal of caution and remember what they mean. They are essentially empirical and reflect the time which on the basis of accumulated experience it has been found that men in different categories -- men or women -- have actually been kept in custody.

That, to a considerable extent, also makes your point, but I think it does emphasize the limitations on using the guidelines with too great emphasis.

The Board of Parole has been fair enough in some of its publicity material, at least its releases and things, that decisions outside the

guidelines are not to be, are not unanticipated, but in every instance they do call for a reasoned statement of the justification for creating a situation which will exceed the guidelines.

I think your suggestion here is that the reasons given were empty and were circumstances which gave rise to a lively suspicion they were based on undisclosed representations made to the Board of Parole by law enforcement officers and never disclosed to Mr. Persico and which he was never afforded an opportunity to controvert; is that right?

MR. ROSENBERG: That's correct in part, your Honor. Also, all the reasons given in the guidelines were reasons that were before your Honor, reasons your Honor was familiar --

THE COURT: That's another matter entirely.

MR. ROSENBERG: These guidelines, your Honor, don't mention 4208(a)(2).

THE COURT: Certainly not. That's another matter, too.

MR. ROSENBERG: The guidelines de-emphasize rehabilitation; (a)(2) emphasizes them. They were promulgated long after the sentence of the Court.

THE COURT: I understand prior. I didn't ask you to repeat your argument, sir.

and the persons working in the prison who are in

MR. BARLOW: In answer to the Court's query, Mr. Persico is in the very high severity of offense, which is the next to the greatest severity of offense. A maximum period that's set there for very high is 55 to 65 months for a salient score.

MR. ROSENBERG: That is not correct. I don't know where he's reading from, but in the decision itself it says 35 to 45 months.

MR. BARLOW: I'm not talking about Mr. Persico right now.

THE COURT: The highest -- the right-hand column you're talking about?

MR. BARLOW: The bottom right-hand column.

THE COURT: Applicable to 1951, armed--

MR. BARLOW: That would be 55 to 65 months and then there is one other category--

THE COURT: That would be where the salient factor score--

MR. BARLOW: Zero to 3.

MR. ROSENBERG: Which is not the case.

THE COURT: I don't say that. I quite understand.

I think the point, though, is that the guideline that you gave was the maximum.

MR. BARLOW: Sixty-five months would be the

being Mr. Persico has been continued to April of

very maximum.

THE COURT: Which is five years and five months as compared with the Congressional maximum of twenty years.

MR. BARLOW: After Mr. Persico began serving his sentence, I think we can glean something else from the record as to what the Court intended at the time of sentencing, since his motion to reduce--it was denied by the Court completely and the 14 years stood, your Honor.

As we stand here right now, getting into the effect that 4208(a)(2) may have on sentence, Mr. Persico still hasn't served one-third of the time under the original sentence, one-third of fourteen years figures out to four years and nine months, so that if he had been sentenced under 4202 he would be eligible for parole October 27, 1976.

I think this is a very salient factor when we consider some of the cases that have been cited on Mr. Persico's behalf. Most of these cases concerning prisoners under 4208(a)(2) had this problem. It was evidently the Board of Parole's policy up until last year that a person under 4208(a)(2) sentence would have an initial hearing at which he was present and his case worker was present, very shortly

after he was incarcerated.

THE COURT: Within ninety days, or something like that?

MR. BARLOW: Yes, sir. Most of them occurred two to three, possibly four months after incarceration and after that initial hearing, then after the guidelines had come out, prisoners were continued for two, three, four months or until the expiration of their sentence. This is what the various, many of the cases cited by the petitioner deal with. In Kortness the defendant had been sentenced for three years. He had his hearing about four months after he went into jail. He was denied-- no further consideration until the expiration of his sentence.

And Mrs. Slutsky, after their appeal, their sentence became five years. Several of the counts were reversed by the Second Circuit. It isn't indicated from the opinion in the Slutsky case exactly how long they were continued, but they presented statistics showing that (a)(2) prisoners with short sentences had been serving longer time before parole than prisoners under the usual sentence, 4202.

The case that was just given to your Honor today, the Brassch case, the defendants there were

given short sentences and early hearings and then continued, either at or near the expiration of their terms.

There's one case dealing with the effect of (a)(2) sentences on the guidelines or the effect of guidelines on (a)(2) sentences, I should say, that hasn't been cited.

Just several months after the Slutsky case last June, the Court of Appeals decided Grasso v. Norton, which had come up from Judge Newman's second Grasso decision. It is at 520 F.2d 27.

There the court held that under these circumstances that I have described, where a prisoner under an (a)(2) sentence gets his first institutional hearing at which he is present and his case worker is present, then, because 4208(a)(2) contemplates a review at or near the one-third portion of the sentence so that a prisoner there isn't put in any worse position than the normal prisoner; that the Board of Parole must give a file review before the one-third expiration of the sentence, and the reason went like this:

The institutional hearings at which the defendant and his case worker could be present and he could ask questions occurred so soon after the

beginning of incarceration for the prisoner that there was insufficient time and therefore insufficient data for the Board of Parole to make a determination as to what effect the institution had had on the prisoner, what rehabilitation there may have been, whether he had tried to better himself or whether he had gotten worse.

The Second Circuit said that because the prisoner has already been present once, this file review which necessarily includes the progress report, such as the one that Mr. Rosenberg read to your Honor, should be a sufficient second hearing for the Board of Parole to determine parole eligibility at or about the one-third point in the sentence, so that after Grasso v. Norton, at least in the Second Circuit an (a)(2) prisoner is now given an institutional hearing within a few months after he comes in and a file review which necessarily includes his progress reports before the one-third point in the sentence.

What has been the case of Mr. Persico? He's had one hearing and I don't know whether he was present at that one or not in October, '72, when he was continued to April of last year, April '75.

In April of '75 he had an institutional

hearing, at which he appeared and this is the time at which his case was designated an original jurisdiction case and sent, referred to the regional directors. Therefore he's already had two hearings and contrary to the usual course of things in Danbury, where the Grasso v. Norton case came out of, he's been present at the second review, the second hearing by the Board of Parole.

In addition to the two hearings there, he's had an appeal to the National Appellate Board, and that's when they affirmed -- excuse me, that's when they decided -- a third time -- since this was an original jurisdiction case to them, that he would be continued to April, '78, and then last October he had an appeal from that decision to the Regional Directors, and the original jurisdiction decision was affirmed.

I think it's also salient to note that this continuation, after two hearings, one review as original jurisdiction, and one appeal, that the continuation to April of 1975 -- I'm sorry, April of 1978, still occurs at less than the halfway point of the original sentence. That will be approximately six years and three months after Mr. Persico went in and the original sentence was for fourteen

years.

I think this is the big difference between cases cited by the petitioner and Mr. Persico. In the cases cited, the prisoners have been deprived of any consideration based on their own participation in a hearing other than the initial hearing at which time there wasn't enough data for the Board of Parole or the representatives there in the institution to note the credibility, the rehabilitation, the institutional behavior of any of the prisoners. I don't think the reasoning applied in those cases stands up to a prisoner who has already had three hearings and an appeal from the last of those, long before his one-third sentence or one-third of the original sentence, has occurred, or where even a continuation is at less than the halfway point of the original sentence.

And even in Garafola v. Benson, this concerned five defendants, four of whom were continued to the expiration of their sentence after their initial hearing and the fifth of whom was continued to a time substantially greater than his one-third sentence. It doesn't appear how long the continuation was but the fifth man was sentenced for five years. I would suggest that even he is in a much

different light than Mr. Persico.

Therefore, it's the Government's position that the Board of Parole's actions are certainly within and have given more to Mr. Persico than the standards set up in Grasso v. Norton, and that Mr. Persico has certainly been given more consideration through the various hearings and appeals before the one-third time of the sentence, so he certainly stands in a better position than he would have been if he had been given the usual sentence. I say "usual." If he had been given a 4202 sentence -- I'm not sure which is the usual sentence any more.

Going to the reasons that the Board of Parole at its various levels has given to continue Mr. Persico, I think we have some misapprehension as to what some of the reasons are. First of all, Mr. Rosenberg cited and also read to your Honor a quotation concerning the de-emphasis of rehabilitative factors. I think he is misreading the quote -- not misreading, but misinterpreting.

First of all, the quotation that was read to your Honor is a statement from the Institute for Public Interest Representation, a group that's in Georgetown University Law Center, that was given

to the Board of Parole after they had to hold hearings. There was a case down in the D.C. Circuit that held that the guidelines and the criteria for parole are administrative actions and therefore they had to hold hearings and give the public a chance to respond pursuant to the Administrative Procedures Act.

I think the misapprehension that Mr. Rosenberg has is that this change has in some way hurt his client. I don't think it has because, quoting, "First by its choice of criteria, the Board has made clear it has de-emphasized rehabilitative factors as a condition of release."

The letter or position of the Public Interest Representation Group goes on to give their views on it.

MR. ROSENBERG: Your Honor, I would like the record to be clear. That statement came right from the Parole Board guidelines, issued September 5th, 1975. If your Honor wishes, I will get a copy of those guidelines and submit them to the Court. That's where they were read from, copied from.

MR. BARLOW: Your Honor, I'll stand by what I said. I have in front of me the page that is being read and the page that was cited.

In any event, the quote goes on to say that you just can't tell about rehabilitation of a person and that sort of brings to mind something Judge Mishler said a couple of years ago in a Rule 35 motion where the defendant's prisoner's attorney had said how his client had completely rehabilitated himself, gone on, gotten his G.E.D., had gone through one or two years of college. Judge Mishler said, in substance, that he always liked to hear something like that; because people say prison can't rehabilitate people. This was certainly an indication that it could rehabilitate people, and then he went on to add that maybe this defendant, who had been convicted, I think, of a narcotics charge, was educating himself so that when he got out of jail he could move into a higher stratum of criminal activity, so I think the point in this statement is well taken; that you can't really tell whether a person is rehabilitated in prison or out, but this hasn't hurt Mr. Persico because I suggest that the proper reading is that rehabilitation is no longer a condition precedent to release and it has now fallen under the guidelines and under the reasonings, the factors the Board takes into consideration for parole

eligibility as one of the factors to be considered, but not any longer as a condition of release, so that the fact that Mr. Persico has now achieved a high school equivalency certainly is to his benefit and indeed he was given the benefit of that in the decision last October by the Regional Directors of the Board of Parole.

The thrust of the petitioner's argument as to the reasons given last October, again, I suggest, because of the thrust of the motion shouldn't be considered by themselves, since the thrust of the motion is that these reasons don't comport, but rather conflict with the Court's intention on sentencing.

I would just like to comment on the interpretation put on some of these reasons. First, I think there's an overriding misapprehension as to the factors which the Board of Parole can view. Throughout several of the quoted references to the reasons, the petitioner says, "Well, Judge Dooling knew about this when he sentenced Mr. Persico." I would suggest that it's entirely proper for the Board of Parole to take relevant factors into consideration. A parole isn't reduction of sentence. Parole is an institutional

determination that a person is ready for release and unlike a motion for reduction of sentence, which usually concerns events that occurred after the time of the original sentence or which weren't a part of the sentencing judge's determination, I think the Board of Parole is entirely right in using this and in fact they cannot have set up the guidelines that they published without reference to many of the factors that the Court considers in virtually all of the sentences, namely, the severity of the crime, the background of the defendant, his demeanor, his character as evidenced either by the pre-sentence report or letters from character witnesses upon sentence and in fact the Board of Parole always has available to it the presentence report and other data that were given to the sentencing judge.

I suggest that taking these factors into consideration, far from being wrong, is not only appropriate, but necessary tools for the Board of Parole to use in deciding whether a person should be released, since the only thing the Board of Parole has to go upon besides these factors are the prisoner's conduct and his rehabilitation or lack of it during his incarceration.

Going to the general analyses that were given

by the Board of Parole, it certainly is true the Board of Parole now must give reasons for denying parole, but as pointed out in King v. the U.S., which is cited by the petitioner, the statement, if it's a brief statement of the grounds of denial, and in noting the administrative conference of the United States had reviewed the Board of Parole and given suggestions as to the criteria and the way in which it should make its parole release decisions, they point out several pitfalls of long, laborious factually detailed reasons for denying parole.

First of all, they said, if you're going to require the Board of Parole to do this, you're requiring the prisoner to sit in his jail cell and wait for months and months and months while someone goes through the record, goes through presentence report, goes through all the material and finally makes up the reasons for the denial.

Secondly, they said another pitfall in requiring more than a brief statement is that the more facts the Board of Parole gives in its decision the more that it seems the necessary posture of the bureaucrat covering himself, and they saw a great danger in providing or making necessary a long detailed reasoning process for the denial of parole,

since by the very nature of bureaucracy, the Board of Parole would come to a point where they were manufacturing the reasons for denial not as the actual reasons, but with a view toward protecting themselves in the litigation which almost certainly goes on after a prisoner has been denied parole.

I think, in conclusion, that the actions of the Board of Parole in Mr. Persico's case have certainly comported with Section 4208(a)(2) and that by the publishing of their guidelines, by the publishing of the criteria and the factors with which they look at each particular case in determining eligibility for parole, that rather than conflicting with what this Court intended when it sentenced Mr. Persico to fourteen years, that they have done exactly what the Court intended, since I would suggest that the evidence from the record shows or could show that the Court in sentencing somebody to that long a time, fourteen years, would want the Board of Parole to assume a much greater role in the initial part of the person's sentence and being much closer to Mr. Persico or any other prisoner, for that matter, since the Court only sees a prisoner when he comes in on a writ, if it's necessary for him to appear for various motions, whereas

the Board of Parole has access to both the prisoner and the persons working in the prison who are in contact with him almost daily and giving the person or giving the agency, namely, the Board of Parole, with the access to the necessary data that help determine release eligibility, that the Board of Parole has assumed this function and certainly a sufficient matter as regards Mr. Persico because nowhere in 4208(a)(2), either the legislative history or the cases construing it, has it been suggested that an (a)(2) sentence mandates an early release. An (a)(2) sentence mandates an early and a continual review of eligibility, but it's still within the Board of Parole's discretion as to whether or not to grant that parole provided they do so in a sufficiently reasoned manner to afford the prisoner due process.

That is all I have, your Honor, unless the Court has any questions.

THE COURT: No.

MR. ROSENBERG: Might I have one moment, your Honor?

THE COURT: Yes.

(Pause)

MR. ROSENBERG: Your Honor, I don't think

Mr. Barlow has squarely met the issue; that issue being Mr. Persico has been continued to April of 1978, which is almost to the very time that his term will expire with good time, industrial time, et cetera, that there is nothing in his power that he can do to ever make parole and be considered under the sentence of this Court, that being 18 U.S.C. 4208(a)(2), the Board of Parole's own actions, own guidelines prohibit them actually considering the prisoner under 4208(a)(2). It is impossible for Mr. Persico to receive parole, your Honor. He will not receive the sentence of this Court as intended by the Court. That's why we're here. Thank you.

THE COURT: I will reserve decision.

MR. ROSENBERG: Thank you, your Honor.

(Time noted: 4:05 p.m.)

A232

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

: 75 C 2033
-against- (60 CR. 147)
:

CARMINE J. PERSICO, JR., et al.,

:

Defendants.

- -X

Appearances:

MARC A. ROSENBERG, Esq. (Messrs. ROSENBERG, ROSENBERG & ROCKMAN) for defendant-petitioner

FRED F. BARLOW, Esq. (DAVID G. TRAGER, Esq., United State Attorney, of Counsel) for the Government

DOOLING, D.J.

Petitioner was sentenced on June 6, 1969, in 60 CR 147, to a term of fourteen years under Section 4208(a)(2). Appeals from the judgment of conviction delayed petitioner's surrender until January 27, 1972. Petitioner has not been paroled. His first parole meeting was in about June of 1972, and resulted in his being continued without parole for an institutional review hearing in April 1975. At some point petitioner was classified as a Special Offender. The April 1975 meeting resulted in a recommendation that, "In view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted." The case

FPI—SS—3-17-72—30M—9153

was designated "original jurisdiction" and referred to the Regional Directors of the Board of Parole on April 28, 1975. The National Appellate Board continued petitioner for an institutional review hearing in April 1978. The offense was rated "high severity," and petitioner was considered as having a salient factor score of 5. The guidelines' range for such an offense and set of salient factors is 45-55 months, and it was noted that petitioner had served 38 months. It was concluded that a decision outside the guidelines was warranted. The basis of the decision, as quoted in counsel's brief was:

> "There is not a reasonable probability that you would live and remain at liberty without violating the law because of your criminal history. BOARD POLICY LIMITS A CONTINUANCE TO NOT MORE THAN 36 MONTHS WITHOUT REVIEW. YOUR CONTINUANCE HAS BEEN LIMITED BY THIS POLICY. Your offense was part of a large-scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer risk than indicated by the salient factor score."

An appeal was taken, and heard in Dallas, Texas, on or about October 8, 1975. It was then realized that petitioner's

FPI—SS—3-17-72—30M—9153

correct salient factor score was 7 rather than 5, and that, therefore, the guideline range was 35 to 45 months rather than 45-55 months. The decision was, nevertheless, affirmed.

Petitioner argues that the sentence imposed on him has been ignored; that he has been denied the parole consideration that is his entitlement under a Section 4208(a)(2) sentence; and that, in essence, by considering undisclosed communications from the Justice Department and otherwise departing from appropriate procedures, the Board of Parole has so distorted the sentence and subverted its own regulations that the sentencing court should grant relief.

Petitioner misapprehends the intention of the Section 4208(a)(2) sentence. It is in no sense a reservation to the sentencing court of a continuing power to review the action of the Parole Board. It is not a direction to the Board to release the defendant at a date earlier than the ordinary parole eligibility date (Section 4202) or before his mandatory release date (Section 4161). Section 4208(a)(2) simply removes the lower limit on the term of incarceration that otherwise results from the existence of Section 4202 and requires the Board of Parole to exercise its powers under

FPI—SS—3-17-72—30M—9153

Section 4203 without reference to the constraint Section 4202 otherwise imposes.

The Board of Parole, in performing its duty under Section 4203, is not required to make its decisions within its guidelines. The guidelines are empirical generalizations, and determinations outside the guidelines may well be required by judgments arrived at in strict obedience to the admittedly very general standards of Section 4203.

The cases petitioner relies on are all cases in which correction of sentence was appropriate because their real effect was not evident at sentence time to court and counsel and the sentences produced an unanticipated protraction of incarceration. That is not this case.

Petitioner may have just complaint to make against his parole treatment. That, however, is not a matter for the sentencing court but for the Courts which have control over the place of petitioner's confinement or jurisdiction to review the action of the Board of Parole in petitioner's case.

In the circumstances of this case there is no occasion

FPI—S3—3-17-72—30M—9153

for an evidentiary hearing in this Court.

It is, accordingly,

ORDERED that application for relief under 28 U.S.C. § 2255 Rule is denied, and the application, treated as a motion to resentence or for reduction of sentence is denied.

Brooklyn, New York

February 20, 1976.

U. S. D. J.

FPL—SS—3-17-72—30M—9153

A237

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ FEB 24 1976 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

CARMINE J. PERSICO, JR., et al.,

Defendants.

----------x

JUDGMENT

75 C 2033

A memorandum and order of the Honorable John F. Dooling,Jr., United States District Judge, having been filed on February 23, 1976, denying the application for relief under 28 U.S.C. §2255, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondent and that the application is denied.

Dated: Brooklyn, New York
February 24, 1976

Lewis Orgel
Clerk

A238

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

THE UNITED STATES OF AMERICA,

-v-

CARMINE J. PERSICO, JR. et al,

----------x

NOTICE OF APPEAL

Civil Action
75 C 2033

Notice if hereby given that CARMINE J. PERSICO, JR. hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this proceeding on the 24th day of February, 1976.

DATED: Garden City, New York, February 25th, 1976.

MARC A. ROSENBERG
ROSENBERG, ROSENBERG & ROCKMAN
200 Garden City Plaza
Garden City, New York 11530
Tel. (516) [illegible]-4300

BEST COPY AVAILABLE

A239

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CARMINE J. PERSICO, JR.,	:	Civil No. 75-0426
Petitioner,	:	
-against-	:	PETITION FOR DECLARATORY RELIEF UNDER 28 USC 2201 AND FOR RELIEF IN THE NATURE OF MANDAMUS UNDER 28 USC 1361
UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE,	:	
Respondent.	:	

CARMINE J. PERSICO, JR., by his attorneys, ROSENBERG, ROSENBERG & ROCKMAN, respectfully alleges as follows:

1. CARMINE PERSICO, JR., is presently incarcerated in the Federal Correctional Institution at Marion, Illinois.

2. Petitioner commenced service of a fourteen-year sentence on or about January 27, 1972. The sentence was imposed under 18 USC 4208(a)(2) by the Hon. J. F. DOOLING, United States District Judge for the Eastern District of New York, after he was convicted by a jury of violations of 18 USC 1951 and 1952 (theft of interstate shipment by hijacking).

3. In or about April, 1972, petitioner submitted written request for parole, which on or about October 11, 1972 was continued with IRH, April 1975.

4. Petitioner on or about March 12, 1975 received notification from the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, that a parole hearing in his case is

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scheduled for April, 1975 at the Federal Correctional Institution in Marion, Illinois.

5. Attorneys for petitioner have ascertained from the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE that the parole hearing in petitioner's case will be held during the week of April 7, 1975, at the Federal Correctional Institution in Marion, Illinois.

6. Petitioner received documentation, annexed hereto as "Exhibit A," which evidences that the parole hearing scheduled will be a sham, without substance, and not consistent with the requirements of law. Said documentation sets forth, in pertinent part: "Recommendation: In view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted." Said document does not state any reasons for "notoriety" of the case, but does set forth that "[Mr. Persico] has maintained a clear conduct record since his arrival. Since his arrival, Persico's adjustment has been deemed as good." The document, dictated by Mr. C. A. CRAIG, Mr. PERSICO's case manager, goes on to provide information with regard to "Release Planning," and "Evaluation and Recommendation for Release." Everything stated in the document is inconsistent with the word "notoriety," and sets forth no reasons for referral of the case for an en banc consideration by the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE.

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ROCKMAN

7. Referral of petitioner's case for en banc consideration without affording petitioner the opportunity to controvert the basis of such action, and without full knowledge of the reasons therefor, deprives petitioner of constitutional rights and effectively results in a denial of parole to petitioner, without permitting a complete record to be made for review purposes.

WHEREFORE, petitioner respectfully requests that this Court, pursuant to Title 28 United States Code Sections 2201 and 1361, adjudge that the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE be enjoined from referring petitioner's case for en banc consideration until:

(a) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE specifically informs petitioner of all adverse matters in his file which will be taken into consideration by the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, including, but not limited to all reasons petitioner's case is being recommended and referred for en banc consideration; the reasons for the "notoriety of this particular case," and a statement whether petitioner's case is being referred for en banc consideration under 28 C.F.R. Section 2.17, and, if so, under which section thereof.

(b) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE affords petitioner full opportunity at the

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D ROCKMAN

parole release hearing scheduled at the Federal Correctional Institution, Marion, Illinois, to respond and controvert the basis for en banc referral, in addition to all adverse matters in his file which will be employed by the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE in its consideration of petitioner's application for parole.

(c) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE provides petitioner, for inspection and examination, all information which will be before the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, including, but not limited to petitioner's pre-sentence report; reasonably comprehensive and explanatory guidance relative to the criteria considered in passing on applications for parole, and a statement whether factors which apparently merited recommendation and referral of pretitioner's application for en banc consideration will be considered as a basis for denial of parole.

(d) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE afford petitioner at the parole release hearing scheduled at the Federal Correctional Institution at Marion, Illinois opportunity to respond thereto and to make a record allowing judicial review thereof.

(e) The UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE informspetitioner of all reasons for re-

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fusal of parole, should there be a denial of parole before referral for en banc consideration, and, if so, setting forth the conditions or requirements which petitioner must fulfill for favorable consideration in addition to a probable, although not guaranteed, release date if such conditions are met, and should there be a departure from the guidelines of the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES BOARD OF PAROLE, an explanation for such departure in the denial of petitioner's parole.

(f) Grant such other and further relief as to this Court may seem just and proper.

ROSENBERG, ROSENBERG & ROCKMAN

By _____
MARC A. ROSENBERG
Attorneys for Petitioner
Office and P. O. Address:
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

A244

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

The undersigned, an attorney admitted to practice in the courts of New York State, hereby affirms as true under all the penalties of perjury that affirmant is a member of the firm of ROSENBERG, ROSENBERG & ROCKMAN, attorneys of record for the petitioner in the within action; that affirmant has read the foregoing petition and knows the contents thereof; that the same is true to affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, affirmant believes it to be true. Affirmant further states that the reason this verification is made by affirmant and not by petitioner is that petitioner is not now within the Judicial District wherein affirmant maintains his offices.

The grounds of affirmant's belief as to all matters not stated upon affirmant's knowledge are as follows: conversations, had with the petitioner and the United States Board of Parole and documentation contained in the file, including, but not limited to documentation received by petitioner from the UNITED STATES BOARD OF PAROLE and BUREAU OF PRISONS.

Dated: Garden City, New York
March 25, 1975

MARC A. ROSENBERG

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RG, ROSENBERG
ROCKMAN

Parole Form 1-24
(Rev. Dec. 1973)

A245

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

Notice of Hearing

Name Persico, Carmine

Register Number 24666-158 Institution Marion

You are hereby notified that a hearing in your case will be held during the ~~week~~ month of April, 1975 at the institution shown above.

At the hearing you may have a representative who will be permitted to make a statement relative to your case. Such statement will be permitted at the close of the hearing. You may waive representation and speak on your own behalf. Forms for waiving representatives may be obtained from your caseworker.

You will receive a Notice of the decision within 15 working days of your hearing, except in emergency situations. If parole is denied, continued, or revoked the reasons will be included in the Notice.

The Notice will also contain instructions for an appeal to the Regional Director. Further appeals may be made to the National Appellate Board. All appeals must be filed within 30 days of the date a Notice is sent.

In certain cases the decision will be made by a quorum of Regional Directors who assume original jurisdiction. Appeals from such decisions also may be made to the National Appellate Board.

Marc Rosenberg, Attorney
200 Garden City Plaza
Garden City, New York

3-12-75
(Date received)

Carmine J. Persico Jr
(Signature)

INMATE COPY

Date April 1975 A246

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

U. S. Penitentiary, Marion, Illinois
INSTITUTION

Inmate Reviewed and/or Received a Copy

SIGNATURE AND DATE

PROGRESS REPORT

IRH XX Interim Annual Other

Name: PERSICO, Carmine J. Jr. Reg. No. 74666-158

Offense: Theft from I/S Shipment Age: 41

Sentence: 14 Years (a)(2) Began: 1-27-72 Months Served: 38

Days EGT: 146 Days FGT: 0 Tentative Release: 10-20-80

Last Board Action and Date: 10-11-72 Continue with IRH, April, 1975

Detainers: None on file

Co-Defendants: See below

Co-Defendants: Hugh McIntosh, USP - Atlanta, Ga., - 9 years
S. Albanese, 5 years probation.
J. Magnasco, deceased.
R. Spero, 5 years probation.
G. LaFante, acquitted.
G. Vacarro, 7 years.
D. Iorio, dismissed.
J. Loretta, dismissed.
S. Scarpa, dismissed.
G. Scarpa, dismissed.
J. Hassett, disposition unknown.
A. Belpriore, disposition unknown.
A. Russo, disposition unknown.

NEW INFORMATION

No new information.

UNITED STATES PENITENTIARY
MARION, ILLINOIS

SPECIAL PROGRESS REPORT

Committed Name PERSICO, Carmine J. Jr. Reg. No. 74666-153 Date April 1975

INSTITUTIONAL ADJUSTMENT

Goals established for Persico were to raise his level of academic skills, acquire a salable skill and involvement in a group counseling program. He is currently enrolled in GED preparation classes through the Education Department and working toward completion of GED requirements. He has an IQ of 110 and a grade point level of 7.1 based on Stanford Achievement Testing of 3-17-72. He receives counseling from correctional counselors and his case manager on an individual basis whenever a situation warrants such counseling.

Persico was originally committed to Atlanta on 3-10-72 for the serving of his present sentence. He was transferred to Marion on 5-12-72 as a result of institutional classification. He was initially assigned to the athletic detail, where he performed general maintenance duties. Later, he was assigned to the radio room on 5-30-74, where he currently remains. His work reports have always been of a satisfactory nature and he is considered to respond to supervision in a favorable manner. In his unit, his personal and quarters sanitation habits have been rated as good. He is considered to be a quiet resident who does not present problems to his work or housing unit supervisors. Since transferring to Marion, Persico has been out on writ for extended periods of time. These periods have been from 11-18-72 to 5-3-73 and 5-27-73 to 10-27-73. He has recently become involved in the Education Department by working toward his GED requirements. He has maintained a clear conduct record since his arrival. Since his arrival, Persico's overall adjustment has been deemed as good. Persico is assigned to light duty due to a deformity he has on his right wrist, which involves a loss of sensation. Other than the above, he is considered to be in good health. He denies the use of drugs or alcohol.

RELEASE PLANNING

Upon release, Persico plans to reunite with his wife and children in Brooklyn, New York. He states that he has been promised employment with the Allied Tactless Company in Brooklyn.

Release Plans:

A. Residence--with wife and children, Mrs. Joyce Persico, 8420 11th Avenue, Brooklyn, N.Y.
B. Employer--with Allied Tactless Company, Brooklyn, N.Y.
C. Advisor--Bishop Andre Penachio, 256 Summit Avenue, Allen Heights, N.J.
D. USPO--James F. Haran, Chief, 307 U. S. Courthouse, Brooklyn, N.Y. 11201

EVALUATION AND RECOMMENDATION FOR RELEASE

Persico is a 41 year old offender who is serving a 14 Year sentence for Theft from Interstate Shipment. He has now served approximately 38 months of this confinement. Although he has spent a good deal of time out on writ, his overall adjustment since being incarcerated on the above charge has been considered as good. Since his incarceration, he has maintained a clear conduct record, has received favorable

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UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

U. S. PENITENTIARY
MARION, ILLINOIS

MASTER
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SPECIAL PROGRESS REPORT

Committed Name PERSICO, Carmine J. Jr. Reg. No. 74666-158 Date April 1975

work and housing reports and has recently become active in self-improvement programming.

Recommendation: In view of the notoriety of this particular case, the Classification Committee recommends that an en banc hearing be conducted.

Dictated by: C. A. Craig
C. A. Craig, Case Manager

2-25-75/ac

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

----------x

CARMINE J. PERSICO, JR.,

Petitioner,

-against-

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES BOARD OF PAROLE,

Respondent.

----------x

MEMORANDUM OF LAW SUBMITTED IN BEHALF OF PETITIONER, CARMINE J. PERSICO, JR.

ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Petitioner
Office and Post Office Address
200 Garden City Plaza
Garden City, New York 11530

MARC A. ROSENBERG
JOSEPH B. EHRLICH
-Of Counsel-

A250

PETITIONER'S APPLICATION FOR PAROLE MUST OF NECESSITY FALL UNDER THE CANOPY OF MINIMAL DUE PROCESS REQUIREMENTS.

Petitioner, CARMINE J. PERSICO, JR. seeks declaratory judgment and appropriate equitable relief in form of injunction or mandamus enforcing his constitutional rights against actions of the Board of Parole in depirvation of his constitutional rights. Petitioner received documentation, annexed hereto as "Exhibit A", evidencing that his case will be summarily referred for an en banc hearing, without being first afforded a parole release hearing at Marion, Illinois, which will be consistent with the canopy of established constitutional rights of petitioner.

Jurisdiction resides in this court. See Title 28 United States Code Sections 2201 et seq., 1361, 1391(e) and Title 5 United States Code Section 702. The Court of Appeals for the District of Columbia stated in Peoples v. United States Department of Agriculture, 427 F.2d. 561 (1970).

> "The District Court for the District of Columbia has an independent source of jurisdiction in the legislation, passed by Congress, and codified in the District of Columbia Code, 11 D.C. Code 521, which gives that court general equity jurisdiction and venue where either party is resident or found within the District of Columbia. This permits actions for declaratory judgment as well as injunction to be maintained against those whose office in the Federal Government establishes their official

residence in the District. Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944); Neston v. Hershey, 425 F.2d. 504, at 521-523 F.2d. (Dec. 16, 1969)."

The District Court of Columbia's historic jurisdiction to entertain the petition herein was also noted by the Court in Peoples. Section 1391(e) of Title 28 United States extended jurisdiction to other District Courts. In any event, the jurisdiction of this court is crystal clear.

Moreover, this Court has the power to grant the relief sought herein and to protect petitioner's constitutional rights. In Sobell v. Reed, 327 F.Supp 1294 (S.D.N.Y. 1971), Judge Marvin E. Frankel stated:

> "But it is urged that the Board's (United States Board of Parole) action is outside the court's power of review. It would be surprising and gravely questionable if Congress had meant to confer such final authority upon any administrative agency, particularly one that makes no pretense to learning in constitutional law."

The Judge furthermore stated in his learned opinion:

> "To be sure, the Parole Board is vested with broad discretion to set the terms and conditions on which a parolee may be released. See 18 U.S.C. 4203 (1964), United States ex. rel. Sperling v. Fitzpatrick, 426 F.2d. 1161, 1166 (2d. Cir. 1970), Kaufman, J. concurring). It is not the law, however, that such discretion embraces authority to decide final questions of constitutional right. For Parole Board members and prison officials are not judges. They are not charged by law and con-

> stitutional mandate with the responsibility for interpreting and applying constitutional provisions***. We do not denigrate their views, but we cannot be absolutely bound by them. Brown v. Peyton, 437 F.2d. 1228, 1232 (4th Cir., 1971) (emphasis added)."

Petitioner claims that the parole release hearing now scheduled for the week of April 7, 1975 will be a sham, without substance. From the documentation received, and annexed to the petition as "Exhibit A", it is manifest that the petitioner's application for parole will be summarily referred for en banc consideration. Such summary referral unequivocally may be enjoined where the action by the Board of Parole deprives petitioner of his due process rights. See Masiello v. Norton, ___F.Supp.___(D. Conn. October 12, 1973); Sobell v. Reed, supra, United States ex. rel. Hitchock v. Kenton, 256 F.Supp. 296 (D.Conn. 1966); Ott v. Liccone, 326 F.Supp. 609, (W.D.Mo. 1970). The documentation received by petitioner (Exhibit A) is bare of any purported authority pursuant to 28 C.F.R. 217 and shows no reason, no necessity and no compulsion to justify the referral of the now scheduled parole release hearing for en banc consideration. The only item which can be construed to purportedly warrant the referral is the view of the Classification Committee that "this particular case is one of notoriety". This view first of all does not specifically come under any of the

categories of 28 C.F.R. 2.17. Secondly, in Masiello v. Norton, the court held that an inmate should have had notice and opportunity to respond to a classification under 28 C.F.R. 2.17. The court was faced with a prisoner seeking habeas corpus relief after the United States Board of Parole notified him the day following his parole release hearing that his case was being referred for en banc consideration pursuant to 28 C.F.R. 2.17.

The inmate in Masiello was classified "organized crime" and not advised of the classification at the parole release hearing. The court found the Parole Board's rules and regulations with regard to the "organized crime" designation as somewhat broad and indefinite and stated that "[i]t is uncontroverted that the classification results in additional restrictions in the prison and adversely affects the chance of early parole." The court granted Masiello a new parole release hearing at the institution in which he was incarcerated, where he was to be given full opportunity to counter the prejudicial classification which caused his case referred for en banc consideration.

Petitioner seeks for inspection and examination all matters in his file which can be construed as adverse or prejudicial, and an opportunity to respond thereto. In Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973) the court concluded with regard to parole re-

lease hearing:

> "The constitutional requirements of minimal due process, i.e., the appearance and actuality of fundamental fairness; reasonable assurance of reasoned decisions rather than arbitrary or capricious ones; and reasonable assurance of reasonably reliable factual bases for decisions are applicable to the parole application process."*

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*It is noted with regard to the viewpoint of the "notoriety of the particular case" that petitioner's co-defendants received substantially less severe sentences with regard to their convictions. More importantly, it is submitted that the petitioner was sentenced under 4208(a)(2) implicityly mitigating the "notoriety" of the case classification set forth in "Exhibit A".

Additionally, one of petitioner's co-defendants was summarily denied parole. The en banc order of the United States Board of Parole set forth the following as its reason for denial of parole.

> "The Board has new and fuller information on your original crime activities, received..., in a communication from the Criminal Division, Department of Justice, Washington, D.C., which causes the Board to conclude that, if released on parole, there is not a reasonable probability that you would live and remain at liberty without again violating the law."

Petitioner seeks to prevent such a result, which clearly would be in deprivation of his established rights. See King v. United States, 492 F.2d. 1337 (CA7, 1974) and other authority cited infra. In King the court cited Johnson "Federal Parole Procedure" a report submitted to the administrative conference of the United States, 25 A.D. Rev. 459, 484-485 (Fall, 1973), where it was stated:

> "From the legal standpoint, requiring a statement of reasons (for denial of parole) makes it possible to check abuse or error. There is no way to discover if the Board is denying parole for an unconstitutional or improper reason if the Board never gives reasons for its decisions. It is not to impugn the good faith or competence of the Board

The court among other relief gave the inmates access to all information which will be before the Board of Parole; provided inmates with opportunity to respond thereto and compelled the Board of Parole to inform inmates with regard to the criteria which will be considered in passing

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> to suggest the possibility that in some cases it might rely on reasons for denying parole that the courts would feel were improper or unconstitutional if they know of them.
>
> * * *
>
> The reasons must be reasonably specific. It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded and whether there is anything he can do to convince the Board otherwise."

In State of Wisconsin v. Goulette, (Wis. Cir. Ct., Jan. 17, 1974) the court stated:

> "This Court, as a member of the Supreme Court's Judicial Education Committee, has conducted and been director of two Judicial sentencing institutes....The most commonly expressed objection of the prisoners was as to parole hearings, that they felt that they did not know why they were turned down or what they needed to do to earn conditional parole."

The court concluded that the discretion on the part of Parole Boards were never absolute or total, and subject to basic requirements of due process and fairness. The court held that a prisoner refused parole must be informed of the reasons for refusal of his parole at that time; the conditions or requirements which he must fulfill for favorable consideration; a probable, although not guaranteed release date if such conditions are met. The court also held that a record must be made at hearing date, otherwise the hearing would be at variance to requirements of law.

upon applications for parole. The court in Childs patently took cognizance of Morrissey v. Brewer, 408 U.S. 471 (1972), which in light of the weight of recent judicial authority denotes substantial changes in due process rights of prison inmates as well as parolees. See Wolf v. McDonnell, 42 L.W. 5190 (U.S. June 26, 1974); Johnson v. Chairman of New York State Board of Parole, 500 F.2d. 925 (CA2, 1974); Batchelder v. Kenton, 383 F. Supp. 299 (C.D. Calif. 1974); Means v. Wainwright, 15 CrL 2411 (Fla.S.C. 1974); State ex. rel. Johnson v. Cady, 185 N.W. 2d. 306 (1971); State of Wisconsin v. Goulette, ___N.E. 2d.___(Wisconsin Civ. Ct., January 17, 1974).

Also see: Battle v. Norton, 365 F.Supp. 925 (D. Conn. 1973); Grasso v. Norton, 371 F.Supp. 171 (D.Conn. 1974); United States ex. rel. Harrison v. Pace, 357 F.Supp. 354 (E.D.Penn. 1973); Lupo v. Norton, 371 F.Supp. 156 (D. Conn. 1974).

(Judge Bryant)

The court in Childs poignantly stated:

> "When we examine the nature of the interest of the parolee facing revocation and that of the parole applicant in the light of the ultimate effect of the Parole Board's determination, it appears obvious that the difference is not enough to exclude the applicant from due process protections. This is so simply because the stakes are the same, incarceration or conditional freedom."
>
> "[I]t has never been held that the Parole Board, or for that matter any other government agency that makes such weighty determinations as

that between an individual's incarceration and his relative freedom may exercise its admittedly broad discretion in an arbitrary and capricious manner."

Petitioner must be given the opportunity to answer and present countervailing arguments in order that there be a complete record upon which the Board of Parole can base a reasoned judgment and to allow for judicial review thereof. The failure to notify petitioner of all adverse matters in his file, and employed by the Board of Parole in its consideration of his application for parole, negates the prisoners sole protection against the risk that he may be unfairly penalized because of matters which he may be able to controvert either at the parole hearing or upon appeal from an adverse decision.

Alternatively, the case of King v. United States, 492 F.2d. 1337 (CA7, 1974) held that Seciton 555 of the Administrative Act applies to parole release hearings before the United States Board of Parole. The court found that a parole release hearing is an "agency proceeding" within the Administrative Procedure Act. Consequently, the relief requested herein is consistent and falls within the purview and authority of Title 5 United States Code, Sections 555 and 552.

The court herein may correct the Board of Parole's

unconstitutional course of impairing petitioner's rights. The court may remove uncertainty from legal relations and clarify, quiet and stabilize them before irretrievable acts have been undertaken. The court will thereby determine and settle issues upon which a whole complex of rights of petitioner depend before there exists a manifest deprivation of petitioner's established due process rights. See Sears Roebuck & Co. v. American Mutual Insurance Company, 372 F.2d. 435.

CONCLUSION

FOR ALL THE ABOVE STATED REASONS, THE RELIEF SOUGHT IN THE PETITION SHOULD BE FORTHWITH GRANTED BY THIS COURT.

Respectfully submitted,

ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Petitioner
Office and Post Office Address
200 Garden City Plaza
Garden City, New York 11530

MARC A. ROSENBERG
JOSEPH B. EHRLICH
-Of Counsel-

Louis James Monroe
910 17th St. NW
Washington DC
785-4133

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARMINE PERSICO, JR.,

Plaintiff,

v.

UNITED STATES BOARD OF PAROLE,
UNITED STATES DEPT. OF JUSTICE,

Defendant.

Civil Action No. 75-0426

FILED
APR - 2 1975
JAMES F. DAVEY, Clerk

O R D E R

This matter came before the Court for a hearing on April 1, 1975. The Court, having entertained the defendant's oral motion to transfer this case to the Eastern District of Illinois pursuant to 28 U.S.C. §1404(a) and having considered the arguments of counsel, concludes that there are no "extraordinary circumstances" present in the instant case which would militate against its being transferred "as a matter of course" to the district of confinement. Young v. U.S. Bureau of Prisons, 125 U.S. App. D.C. 105, 106, 367 F.2d 331, 332 (1966). The Court further concludes that the burden on the Government of bringing the plaintiff to this district for hearings, the availability of witnesses and files in the district of confinement, and the availability of speedier resolution in that district all militate in favor of transferring the case there. See Starnes v. McGuire, No. 73-1034 (D.C. Cir. 1974).

Accordingly, it is this 1st day of April, 1975,

ORDERED that the Clerk of this Court be, and he hereby is directed to transmit this action to the United States District Court for the Eastern District of Illinois, such transfer to take place immediately, plaintiff's counsel having indicated that he does not intend to appeal.

JUDGE

Parole Form H-7(a)
(Rev. June 1974)

B

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UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

RECEIVED
WARDEN'S OFFICE
APR 16 1975
UNITED STATES PENITENTIARY
MARION, ILLINOIS

Notice of Action

Name Carmine J. Persico, Jr.

Register Number 74666-158 *Institution* Marion

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Your case has been designated as Original Jurisdiction and referred to the Regional Directors for their decision.

Conditions or remarks:

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

RHO
EFF

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

April 14, 1975
(Date Notice sent)

North Central
(Region - Specify)

C. Hubbard
(Docket Clerk)

National Appellate Board
(Check)

INMATE COPY

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1-7(a)
(973)

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

RECEIVED
WARDEN'S OFFICE
1975

Notice of Action

UNITED STATES PENITENTIARY
MARION, ILLINOIS

Name Carmine J. Persico, Jr.

Register Number 74666-158 Institution Marion

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Institutional Review Hearing in April 1978

Conditions or remarks: REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 5. You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

(Date Notice sent)

(Region - Specify)

(Docket Clerk)

National Appellate Board (Check)

INMATE COPY

Exhibit "B"

Parole Form H-7(a)
(Rev. Dec. 1973)

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UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

Notice of Action

Name Carmine J. Persico, Jr.

Register Number 74666-158 *Institution* Marion

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Conditions or remarks:

Page 2

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

without review. Your continuance has been limited by this policy. Your offense was part of a large scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer parole risk than indicated by the salient factor score.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

April 28, 1975
(Date Notice sent)

(Region - Specify)

NFB
(Docket Clerk)

National Appellate Board XXX
(Check)

INMATE COPY

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
REGIONAL OFFICE

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NOTICE OF ACTION - PART II - SALIENT FACTORS

Case Name Carmine J. Persico, Jr. Register Number 74666-158

Item A ---------- [0]

No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B ---------- [0]

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C ---------- [1]

Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D ---------- [1]

Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E ---------- [1]

Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F ---------- [1]

No history of heroin, cocaine, or barbiturate dependence = 1
Otherwise = 0

Item G ---------- [0]

Has completed 12th grade or received GED = 1
Otherwise = 0

Item H ---------- [0]

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I ---------- [1]

Release plan to live with spouse and/or children = 1
Otherwise = 0

Total Score ---------- [5]

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Rosenberg, Rosenberg & Rockman
Attorneys and Counselors at Law

HARRY ROSENBERG (1915-1973)
GEORGE ROCKMAN
MARC A. ROSENBERG
MICHAEL M. PERLMAN
HOWARD A. SCHUMINSKY
JOSEPH B. EHRLICH

Two Hundred Garden City Plaza
Garden City, New York 11530

516-248-4300

August 27, 1975

Hon. James L. Foreman
United States District Judge
United States District Court
Eastern District of Illinois
East St. Louis, Illinois 62202

RE: Carmine J. Persico, Jr., Petitioner vs.
United States Department of Justice and
United States Board of Parole, Respondent.
Civil No. 75-3087

Honorable Sir:

We have this date submitted Affidavit in Opposition to respondent's Motion to Dismiss and in support of petitioner's Notice of Motion for amendment of the pleadings to one of a writ of Habeas Corpus.

We have annexed as Exhibit "A" to said affidavit a copy of the court papers in Stassi v. Ho[illegible]an written by Chief Judge Edenfeld of the United States District Court for the Northern District of Georgia. We believe that the determination of that court has a great bearing and much similarity to the relief requested by Mr. Persico's original papers filed with this Court.

We understand that your Honor has been burdened with a heavy case load. However, since Mr. Persico's parole application has been decided by the National Appellate Board of the United States Board of Parole, its Notice of Action being attached to the affidavit submitted this date to this Court as Exhibit "B", we respectfully request that his petition for relief be expeditiously considered by the Court. In this regard, we note that Mr. Persico's petition was transferred to this Court by the United States District Court for the District of Columbia in consideration that there would be the availability of a speedier resolution in this district.

In light of which we believe to have been a serious deprivation of Mr. Persico's rights and in view of the grievous

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loss suffered from its denial, we hope that this matter can be set down in the immediate future for argument or disposition.

Respectfully yours,

ROSENBERG, ROSENBERG & BECKMAN

By: MARC A. ROSENBERG

MAR:ggo
encs.

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United States Department of Justice
United States Board of Parole
Washington, D.C. 20537

October 29, 1975

Mr. Marc A. Rosenberg
Attorney at Law
200 Garden City Plaza
Garden City, N. Y. 11530

Re: Carmine J. Persico, Jr.
Reg. No. 74666-158

Dear Mr. Rosenberg:

This is to confirm our telephone call to your office on October 16, 1975.

The U. S. Board of Parole, meeting in Dallas, Texas, on October 15, 1975, affirmed the previous decision dated April 28, 1975. However, Mr. Persico's salient factor score has been adjusted to 7. This means that his case has been continued for an institutional review hearing in April 1978.

Sincerely yours,

Daniel J. Capodanno

DANIEL J. CAPODANNO
Analyst
National Appellate Board

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ADULT

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations. Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
LOW MODERATE				
Alcohol law violations. Counterfeit currency (passing/possession less than $1,000). Drugs: marihuana, simple possession (less than $500). Firearms Act, possession/purchase/sale (single weapon—not altered or sawed-off). Forgery/fraud (less than $1,000). Income tax evasion (less than $10,000). Selective Service Act violation. Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 26 mo.
MODERATE				
Bribery of public officials. Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: "Hard drugs", possession by drug user (less than $500). Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession (less than $5,000). "Soft drugs", sale (less than $500). Embezzlement (less than $20,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (altered weapon(s), machinegun(s), or multiple weapons). Income tax evasion ($10,000 to $50,000). Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications. Misprision of felony. Receiving stolen property with intent to resell (less than $20,000). Smuggler of aliens. Theft/forgery/fraud ($1,000 to $19,999). Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possession $20,000 or more). Counterfeiting (manufacturing). Drugs: "Hard drugs" (possession with intent to distribute/sale) by drug user to support own habit only. Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession ($5,000 or more). "Soft drugs", sale ($500 to $5,000). Embezzlement ($20,000 to $100,000). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purposes). Organized vehicle theft. Receiving stolen property ($20,000 to $100,000). Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.	32 to 38 mo.
VERY HIGH				
Robbery (weapon or threat). Drugs: "Hard drugs" (possession with intent to distribute/sale for profit [no prior conviction for sale of "hard drugs"]. "Soft drugs", sale (more than $5,000). Extortion. Mann Act (force). Sexual act (force)	26 to 36 mo.	36 to 45 mo.	45 to 55 mo.	55 to 65 mo.
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage. Explosives (detonation). Kidnaping. Willful homicide	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

[1] These guidelines are predicated upon good institutional conduct and program performance.

[2] If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.

[3] If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

[4] If an offense behavior involved multiple separate offenses, the severity level may be increased.

[5] If a continuance is to be given, allow 30 d (1 mo) for release program preparation.

[6] "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

BEST COPY AVAILABLE

Recd 4/19/76
Evelyn Cohen